Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-720

BANK OF HENDERSONVILLE,
Petitioner,

v.

RED BARON FLYING CLUB, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

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OCTOBER TERM, 1978

No.

BANK OF HENDERSONVILLE,
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RED BARON FLYING CLUB, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The petitioner, Bank of Hendersonville, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee entered in this proceeding on July 31, 1978, denying the Petition of the Bank of Hendersonville for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals of Tennessee, Middle Section, entered on December 2, 1977.

OPINION BELOW

The opinion of the Court of Appeals of Tennessee, Middle Section at Nashville, not yet reported, and the Memorandum Opinion of the Chancellor of the Chancery Court of Putnam County, Tennessee, appear in the Appendix hereto, as does the judgment of the Supreme Court of Tennessee denying the Petition for a Writ of Certiorari. No other opinion was rendered by the Supreme Court of Tennessee.

JURISDICTION

The judgment of the Supreme Court of Tennessee was entered on July 31, 1978, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Did the Congress in enacting the provisions of the Federal Aviation Act, 49 U.S.C. §§ 1401 *et seq.*, which provide that, from the time of filing for recordation of any conveyance which affects the title to, or any interest in, any civil aircraft of the United States, such conveyance or interest shall be valid as to all persons, intend to protect a person who lends money to a dealer in aircraft on the security of the dealer's inventory, despite a state law rule purporting to protect purchasers in the ordinary course of business from prior perfected security interests, where the sale is effected without accounting for the proceeds to the dealer's financer?

STATUTORY PROVISIONS INVOLVED

The apposite provisions of the Federal Aviation Act, 49 U.S.C. §§ 1401-1406, are reproduced in the Appendix, as is Section 9-307 of the Uniform Commercial Code, T.C.A. § 47-9-307.

STATEMENT OF THE CASE

The petitioner here is a bank which was, in part, financing a corporation, Mid-South Aviation, Inc., a dealer in aircraft which bought and sold airplanes at retail. The Bank of Hendersonville loaned money to Mid-South Aviation, Inc., on the security of the airplane here involved, and this note was secured by a security interest created by a validly executed security agreement, correctly identifying the aircraft and recorded as required by 49 U.S.C. § 1403. The note and security agreement were dated June 11, 1974, and the security agreement was filed for record with the FAA Aircraft Registry in Oklahoma City, Oklahoma, on June 25, 1974.

The aircraft in issue was purchased by the Red Baron Flying Club, Inc., on August 2, 1974, and on August 5, 1974, the Red Baron Flying Club forwarded its bill of sale to the Federal Aviation Administration in Oklahoma City for recordation. Inquiry by telephone or by mail would have apprised the respondent, Red Baron Flying Club, Inc., of the existence and filing of the notice of the security interest owned by the Bank of Hendersonville.

Mid-South Aviation, Inc., was subsequently adjudicated a bankrupt in the United States District Court for the Middle District of Tennessee, and, upon learning that the airplane, which was the subject of its security interest, had been sold to Red Baron, the Bank of Hendersonville made demand upon the Flying Club, in the alternative, for the return of the aircraft or the payment of $13,761.75, the balance then due and unpaid on the promissory note. The respondent, Red Baron Flying Club, Inc., through its counsel, refused to pay the balance due on the note of Mid-South Aviation, Inc., or to return the aircraft, and, in fact, made demand upon the Bank of Hendersonville that it take the necessary

steps to release the security interest of record with the Federal Aviation Administration in Oklahoma City.

The petitioner, Bank of Hendersonville, took the position that the recording provisions of the Federal Aviation Act preempted conflicting state rules, and that its security interest, of record at the Federal Aviation Administration Aeronautical Center, was a first lien upon the aircraft, and that the Red Baron Flying Club purchased the airplane subject to this security interest. PARAGRAPH "*SECOND*" of the petitioner's Complaint in the Chancery Court for Putnam County, Tennessee, claimed the protection of the federal statute in the following language:

> *SECOND:* On June 25, 1975, the security agreement, described herein as "Exhibit A", was caused by plaintiff to be filed for record with the Department of Transportation, Federal Aviation Administration Aeronautical Center, Oklahoma City, Oklahoma. Said conveyance was recorded at that Center on July 1, 1974, as Conveyance No. C117864, all as shown on the notice of recordation sent to the plaintiff by the Department of Transportation, and a copy of which is attached hereto marked as "Exhibit B". The effect of said recordation, without more, was to afford constructive notice to all subsequent purchasers and lienors of plaintiff's prior rights.

The respondent, Red Baron Flying Club, Inc., has consistently taken the position in this litigation that it was a "purchaser in the ordinary course of business" within the meaning of state law, the Uniform Commercial Code, Tennessee Code Annotated § 47-9-307, and that, as such, it took the aircraft free of any pre-existing security interests, whether or not it knew of them, or could reasonably have learned of them, and furthermore,

whether or not sale of the aircraft was forbidden by the security agreement of the Bank of Hendersonville, which was the case.

The Chancery Court of Putnam County, Tennessee, held that the provisions of the Federal Aviation Act regarding the recordation of interests in aircraft preempted the "purchaser in ordinary course of business" doctrine of state law, and that the Red Baron Flying Club did in fact purchase the aircraft subject to the prior security interest of the Bank of Hendersonville. This decision was reversed by the Court of Appeals of Tennessee, Middle Section, at Nashville, which held, with one of the three-judge panel dissenting, that there was no intent on the part of Congress to preempt state law with regard to such issues as the "purchaser in ordinary course of business" doctrine, and that even though the security interest of the Bank of Hendersonville was "valid" as to all persons from and after filing for recordation with the Federal Aviation Administration Aeronautical Center, the validity related only to the intrinsic enforceability of the instrument, and not to its "notice" effect on third parties. The dissenting judge, as did the majority, admitted that "the issue is obviously not free from doubt," but concluded that Congress intended in 49 U.S.C. § 1403 to set up a rule of priority that controls the conflicting interest between the aircraft dealer's financer or lender and one who purchases from a dealer in aircraft. On July 31, 1978, the Supreme Court of Tennessee denied the Petition of the Bank of Hendersonville for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The conflict between state and federal law presented by this case is a particularly acute and significant one, and in light of recent judicial developments, it seems to the petitioner imperative that the matter be reviewed by this Court. The wholesale aircraft financing industry has been placed in an untenable position by decisions such as the one sought to be reviewed here, and the purchasers of aircraft are similarly positioned upon the horns of a dilemma, faced with continuing litigation where they have purchased an aircraft impressed with a lien created by a prior consensual security agreement between a lender and the selling dealer.

The precise issue presented by this petition was passed upon by the Supreme Court of California in *Dowell v. Beech Acceptance Corp., Inc.*, 3 Cal. 3d 544, 91 Cal. Rptr. 1, 476 P.2d 401 (1970). There, the Supreme Court of California in a well-reasoned opinion held that prior recorded security interests are protected against subsequent buyers who fail to search the Federal Aviation Administration Aeronautical Center records. The California court concluded that the Federal Aviation Act, 49 U.S.C. § 1401 *et seq.*, provides a plenary priority system, with the key being the first to record, and contradictory state priority rules are therefore preempted. While there have been decisions of other courts which opted for the application of the state "purchaser in the ordinary course of business" doctrine, *e.g., Sanders v. M. D. Aircraft sales, Inc.*, 575 F.2d 1086 (3rd Cir. 1978); *Idabel National Bank v. Tucker*, 544 P.2d 1287 (Okl. App. 1976), the question as to whether state or federal law controls in this important area remains very much in doubt, and the industry very much troubled.

The present posture of the law is that at least two state courts of last resort, Tennessee and California, have, on identical facts, held in favor of state law and federal law, respectively, in contexts where the clash between the two rules of law is direct and the decision outcome determinative. This Court denied a Petition for a Writ of Certiorari in *Dowell v. Beech Acceptance Corp.*, 404 U.S. 823 (1971), and while it is apparent that other courts have taken to heart this Court's admonitions not to draw conclusions from denial of Petitions for Writs of Certiorari, in that there have been decisions contrary to *Dowell*, the denial of the Petition for a Writ of Certiori in the instant case would add to the gross confusion which is typified both by the legal literature and the judicial decisions, to say nothing of the industry-wide problems created by the conflict between state and federal law.

Since World War II, an expanding economy and mass production of new technologies have combined to increase vastly the business and recreational use of both large and small aircraft. Large sums of money have been involved in financing the purchase of these highly expensive chattels, and as the demand for aircraft increased, more of the industry's capital needs were met through secured financing. Due to the considerable value of modern airplanes, aircraft parts and the economics of the industry, secured financing arrangements on a long term basis became necessary. This factor increased the likelihood of conflicts between secured lenders and the claims of subsequent lienors, purchasers, accessions suppliers, and mechanics lienors. See Sigman, *The Wild Blue Yonder: Interests in Aircraft under our Federal System*, 46 So. Cal. L. Rev. 316, 318 (1973).

The statutory language of the Federal Aviation Act leaves little room for doubt that Congress intended to promote the aircraft industry by protecting and facilitating aircraft financing.

State law (the Uniform Commercial Code) itself reflects an understanding of the very real possibility that a federal statute, dealing with special types of property, might have a preemptive effect on the application of state law. For example, Section 9-104 (T.C.A. § 47-9-104) states:

> This chapter does not apply
>
> (A) To a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, *to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property.* [Emphasis added].

Similarly, Comment 1 to T.C.A. § 47-9-104, states that "where a federal statute regulates the incidents of security interests in particular types of property, those security interests are, of course, governed by the federal statute and excluded from this article." The Federal Aviation Act is admittedly skeletal in nature, but the Supreme Court of California in *Dowell* held, and we believe we can show, plausibly, that the federal act does establish a complete system of priorities, needing no interstitial filling by state law. Only this Court can provide the needed guidance to the court and the industry on this question, and denial of this petition would immeasurably complicate the problem for all interests involved.

Finally, the decision below, in our view, is incorrect. The system of recordation established by Congress in the

Federal Aviation Act, while not so detailed as the system of priorities established by the Uniform Commercial Code (state law), nevertheless establishes a system of priorities easy of comprehension, certain of application and precise in its language. Adherence to its simple rules would have avoided any loss or difficulty to the respondent, Red Baron Flying Club, Inc., here. The statute simply provides in 49 U.S.C. § 1403(d) that "each conveyance . . . shall from the time of its filing for recordation be *valid as to all persons without further or other recordation.* . . ." [Emphasis added]. That "valid" does not refer to the inherent validity of the recorded instrument itself is shown by the express commitment of that issue to state law in § 1406. Furthermore, in the same sentence quoted from above, the word "effective" is used as being synonymous with "valid," indicating very clearly that, as used in the federal act, "valid" refers to a rule of priority.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of Tennessee.

Respectfully submitted,

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October 27, 1978

APPENDIX

The pertinent provisions of the Federal Aviation Act, 49 U.S.C. §§ 1401-1406 (Vol. 10, Page 12054 of the United States Code, 1970 ed.) provide as follows:

§ 1401. Registration of aircraft nationality

Necessity; aircraft of national-defense forces; transfer of ownership

(a) It shall be unlawful for any person to operate or navigate any aircraft eligible for registration if such aircraft is not registered by its owner as provided in this section, or (except as provided in section 1508 of this title) to operate or navigate within the United States any aircraft not eligible for registration: *Provided*, That aircraft of the national-defense forces of the United States may be operated and navigated without being so registered if such aircraft are identified, by the agency having jurisdiction over them, in a manner satisfactory to the Secretary of Transportation. The Secretary of Transportation may, by regulation, permit the operation and navigation of aircraft without registration by the owner for such reasonable periods after transfer of ownership thereof as the Secretary may prescribe.

Eligibility for registration

(b) An aircraft shall be eligible for registration if, but only if—

(1) It is owned by a citizen of the United States and it is not registered under the laws of any foreign country; or

(2) It is an aircraft of the Federal Government, or of a State, Territory, or possession of the United States, or the District of Columbia, or of a political subdivision thereof.

Issuance of certificate

(c) Upon request of the owner of any aircraft eligible for registration, such aircraft shall be registered by the Secretary of Transportation and the Secretary shall issue to the owner thereof a certificate of registration.

Applications

(d) Applications for such certificates shall be in such form, be filed in such manner, and contain such information as the Secretary of Transportation may require.

Suspension or revocation

(e) Any such certificate may be suspended or revoked by the Secretary of Transportation for any cause which renders the aircraft ineligible for registration.

Effect of registration

(f) Such certificate shall be conclusive evidence of nationality for international purposes, but not in any proceeding under the laws of the United States. Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue.

§ 1402. Registration of engines, propellers, and appliances

The Secretary of Transportation may establish reasonable rules and regulations for registration and identification of aircraft engines, propellers, and appliances, in the interest of safety, and no aircraft engine, propeller, or appliance shall be used in violation of any such rule or regulation.

§ 1403. Recordation of aircraft ownership

Establishment of recording system

(a) The Secretary of Transportation shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;

(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff shaft horsepower, and also any assignment or amendment thereof or supplement thereto;

(3) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 1424(b) of this title for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof; and also any assignment or amendment thereof or supplement thereto.

Recording of releases, cancellations, discharges or satisfactions

(b) The Secretary of Transportation shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

Validity of conveyances or other instruments; filing

(c) No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation: *Provided*, That previous recording of any conveyance or instrument with the Administrator of the Civil Aeronautics Administration under the provisions of the Civil Aeronautics Act of 1938 shall have the same force and effect as though recorded as provided herein; and conveyances, the recording of which is provided for by subsection (a)(1) of this section made on or before August 21, 1938 and instruments, the recording of which is provided for by subsections (a)(2) and (a)(3) of this section made on or before June 19, 1948, shall not be subject to the provisions of this subsection.

Effect of recording

(d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, except that an instrument recorded

pursuant to subsection (a)(3) of this section shall be effective only with respect to those of such items which may from time to time be situated at the designated location or locations and only while so situated: *Provided*, That an instrument recorded under subsection (a)(2) of this section shall not be affected as to the engine or engines, or propeller or propellers, specifically identified therein, by any instrument theretofore or thereafter recorded pursuant to subsection (a)(3) of this section.

Form of conveyances or other instruments

(e) Except as the Secretary of Transportation may by regulation prescribe, no conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

Index of conveyances and other instruments

(f) The Secretary of Transportation shall keep a record of the time and date of the filing of conveyances and other instruments with him and of the time and date of recordation thereof. He shall record conveyances and other instruments filed with him in the order of their reception, in files to be kept for that purpose, and indexed according to—

(1) the identifying description of the aircraft, aircraft engine, or propeller, or in the case of an instrument referred to in subsection (a)(3) of this section, the location or locations specified therein, and

(2) the names of the parties to the conveyance or other instrument.

Regulations

(g) The Secretary of Transportation is authorized to provide by regulation for the endorsement upon certificates of registration, or aircraft certificates, of information with respect to the ownership of the aircraft for which each certificate is issued, the recording of discharges and satisfactions of recorded instruments, and other transactions affecting title to or interest in aircraft, aircraft engines, propellers, appliances, or parts, and for such other records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties dealing with civil aircraft of the United States, aircraft engines, propellers, appliances, or parts.

Previously unrecorded ownership of aircraft

(h) The person applying for the issuance or renewal of an airworthiness certificate for an aircraft with respect to which there has been no recordation of ownership as provided in this section shall present with his application such information with respect to the ownership of the aircraft as the Secretary of Transportation shall deem necessary to show the persons who are holders of property interests in such aircraft and the nature and extent of such interests.

§ 1404. Limitation of security owners' liability

No person having a security interest in, or security title to, any civil aircraft, aircraft engine, or propeller under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft, aircraft engine, or propeller under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the

aircraft, aircraft engine, or propeller so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, aircraft engine, or propeller, or by the ascent, descent, or flight of such aircraft, aircraft engine, or propeller or by the dropping or falling of an object therefrom, unless such aircraft, aircraft engine, or propeller is in the actual possession or control of such person at the time of such injury, death, damage, or loss.

§ 1405. Dealers' aircraft registration certificates

The Secretary of Transportation may, by such reasonable regulations as he may find to be in the public interest, provide for the issuance, and for the suspension or revocation, of dealers' aircraft registration certificates, and for their use in connection with aircraft eligible for registration under this chapter by persons engaged in the business of manufacturing, distributing, or selling aircraft. Aircraft owned by holders of dealers' aircraft registration certificates shall be deemed registered under this chapter to the extent that the Secretary of Transportation may, by regulation, provide. It shall be unlawful for any person to violate any regulation, or any term, condition, or limitation contained in any certificate, issued under this section.

§ 1406. Law governing validity of certain instruments

The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the

subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

Tennessee Code Annotated, Section 47-9-307 (Vol. 8A, Cumulative Supplement, Page 48), provides as follows:

47-9-307. Protection of buyers of goods.—A buyer in ordinary course of business (subsection (9) of § 47-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence.

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BANK OF HENDERSONVILLE, *Petitioner*	:	
vs.	:	PUTNAM EQUITY
RED BARON FLYING CLUB, INC., et al., *Respondents*	:	

IN RE: PETITION FOR WRIT OF CERTIORARI OF BANK OF HENDERSONVILLE

Upon consideration of the petition and briefs in support thereof of the Bank of Hendersonville, the reply briefs of Red Baron Flying Club, Inc., et al., the amicus curiae brief of Aircraft Finance Association and General Aviation Manufacturers Association, the opinions of the Court of Appeals and the record in the cause,

Finding no error in the Court of Appeals the writ is denied at the cost of petitioner.

PER CURIAM

Filed: July 31, 1978

COURT OF APPEALS, NASHVILLE

RED BARON FLYING CLUB, INC., et al., *Appellant*	:	
vs.	:	PUTNAM EQUITY
BANK OF HENDERSONVILLE, *Appellee*	:	Reversed and Dismissed.

This cause coming on to be heard upon a transcript of the record from the Chancery Court of Putnam County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the decree of the Chancellor there is reversible error.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the decree of the Chancellor be reversed and that the plaintiff's suit against Red Baron Flying Club, Inc., is dismissed.

All costs of the case will be paid by the Bank of Hendersonville for which execution may issue if necessary. 12/2/77. (Drowota, J., Dissenting)

BANK OF HENDERSONVILLE, *Plaintiff-Appellee,*	:	
vs.	:	PUTNAM EQUITY
RED BARON FLYING CLUB, INC., et al., *Defendants-Appellants.*	:	

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM CHANCERY COURT OF PUTNAM COUNTY, TENNESSEE

THE HONORABLE SCOTT CAMP, CHANCELLOR

Filed: Dec. 2, 1977

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HENRY F. TODD,
Judge

REVERSED AND DISMISSED

OPINION

The defendant, Red Baron Flying Club, Inc., has appealed from the Chancellor's decree sustaining the lien claim (security interest) of the plaintiff, Bank of Hendersonville, in respect to an aircraft purchased by appellant from Mid-South Aviation, Inc. On this appeal, only the respective rights of Red Baron and the bank are in issue.

The facts are uncontroverted. Mid-South, an aircraft dealer, sold to Red Baron the subject aircraft out of its (Mid-South's) stock of several aircraft. The plane was paid for by cashier's check. At the time, the appellee bank held a security interest upon a number of Mid-South's aircraft, including the subject plane. Mid-South failed to satisfy the security interest and this suit was filed to enforce same in respect to the subject plane. The bank's security interest was at all pertinent times duly recorded with the F.A.A. Aircraft Registry.

Before the Chancellor, and on appeal to this Court, the sole question is one of law: whether a security interest upon an airplane held as part of a dealer inventory duly recorded as required by federal law, is superior

to the rights of a purchaser for value from the dealer without actual notice of the security interest.

T.C.A. § 47-9-307 provides:

"**47-9-307. Protection of buyers of goods.**—A buyer in ordinary course of business (subsection (9) of § 47-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence; [Acts 1963, ch. 81, § 1 (9-307); 1965, ch. 362, § 1.]"

T.C.A. § 47-9-104 provides in part:

"**47-9-104. Transactions excluded from chapter.**—This chapter does not apply

(a) to a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, to the extent that such statute governs the rights of parties to and third parties affected by transactions in particular types of property; or . . ."

"Comments to Official Text" under said statute include the following:

"**Purposes:**

To exclude certain security transactions from this Article [Chapter].

1. Where a federal statute regulates the incidents of security interests in particular types of property, those security interests are of course governed by the federal statute and excluded from this Article [Chapter]. The Ship Mortgage Act, 1920, is an example of such a federal act. Legislation covering aircraft financing has been proposed to the Congress, and, if enacted, would displace this Article [Chapter] in that field. The present provisions of

the Civil Aeronautics Act (49 U.S.C. § 523) call for registration of title to and liens upon aircraft with the Civil Aeronautics Administrator and such registration is recognized as equivalent to filing under this Article [Chapter] (Section 9-302(3)); but to the extent that the Civil Aeronautics Act does not regulate the rights of parties to and third parties affected by such transactions, security interests in aircraft remain subject to this Article [Chapter], pending passage of federal legislation."

Appellee refers to the "Comments" just quoted as being "obsolete," because it does not take cognizance of Federal Legislation passed in 1958 and 1959, not cited by appellee. However, T.C.A. § 47-9-104 was passed in 1963, long after 1958 and 1959, from which it is difficult to conceive an intelligent "comment" made in ignorance of 1958 and 1959 law.

The brief of appellee refers to the Federal Aviation Act generally, but does not cite specific portions thereof. More detailed citation would have been more in conformity with the rules of this Court and would have been a distinct courtesy, kindness and convenience to this Court.

Title 49 §§ 1403, 1406, of the U.S. Code provides:

"**§ 1403. Recordation of aircraft ownership**

Establishment of recording system

(a) The Secretary of Transportation shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States; . . .

* * *

Effect of recording

(d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, . . .

* * *

§ 1406. Law governing validity of certain instruments

The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified."

Appellant insists that the federal statute just quoted does not aptly preempt and remove airplanes from the provisions of the state statute which favor a purchaser in ordinary course of business over the holder of a mortgage on inventory.

Appellee insists that the federal statute does preempt the subject priority of interests in aircraft and creates a right in favor of the holder of a security interest in an aircraft held in stock by a dealer, such right being superior to that of a purchaser from the dealer in ordinary course of business.

In *Texas National Bank of Houston v. Aufderheide, et al.*, (U.S.D.C., Ark-1964), 235 F.Supp. 599, there was a "floor plan" lien, duly recorded with the F.A.A., but

the mortgagee was shown to have followed a practice of allowing the dealer to sell and deliver planes out of stock in violation of the mortgage instrument. The District Court held that the mortgagee had, by its conduct, waived any priority of rights against the purchaser and said:

"[1] There is no question that the Congress by the statutory enactments which have been mentioned has preempted the field of registration and recording of title instruments affecting commercial aircraft, Pacific Financial Corporation v. Central Bank & Trust Co., 5 Cir., 296 F.2d 68, 71, so that protection is no longer afforded to a purchaser or mortgagee of such an aircraft by a recording of his conveyance or mortgage under a State recording statute.

"[2] On the other hand, compliance with section 1403 does not validate a conveyance or other instrument which is lacking in initial or inherent validity as a contract document between the original parties, as, for example, a mortgage or conveyance obtained by fraud or without consideration, or executed by an incompetent party. Questions of such inherent or original validity must be determined by reference to applicable State law. This has been expressly recognized by the Congress. See in this connection the Act of June 30, 1964, P.L. 88-346, 78 Stat. 236, which statute, among other things, provides that the validity of a conveyance or other instrument affecting an aircraft is to be determined by the law of the place where the instrument is delivered. In the Court's estimation the validity about which Congress was talking in the 1964 Act is what the Court has referred to as the initial or inherent validity of the instrument in question.

"[3] While the act of recording a conveyance or mortgage under the terms of the federal statute or any other recording statute does not confer inherent validity upon an instrument otherwise basically invalid, proper recordation can, and usually does, have a substantial bearing on the validity of the instrument as to third persons, and as to the priority to be accorded to that instrument with respect to other claims or liens affecting the property involved whether arising before or after the recordation.

* * *

II.

"[5,6] It does not follow, however, that section 1403 has repealed or abolished the general rule of chattel mortgage law that when a mortgagee consents to the sale of a mortgaged chattel free of lien by the mortgagor, the purchaser takes free of the mortgage lien and his rights are superior to those of the mortgagee. 15 Am.Jur.2d, Chattel Mortgages, §§ 150, 151, and 153; 14 C.J.S. Chattel Mortgages § 262. And a provision in a chattel mortgage prohibiting a sale of the mortgaged chattel without a mortgagee's consent is waived if the mortgagee knowingly permits the violation of such provision. 15 Am.Jur.2d, p. 324."

235 F.Supp., p. 603

In *State Securities Company v. Aviation Enterprises, Inc., et al.*, (10th USCA, 1966), 355 F.2d 225, the dealer executed a mortgage on the subject aircraft which was subsequently sold to a customer who had no knowledge of the mortgage which was *not* recorded with the F.A.A. as required by federal law. The purchaser did not record his bill of sale with the F.A.A., but the U.S. Court of Appeals sustained the rights of the purchaser as superior to those of the mortgagee stating:

"[1,2] By providing a federal system for registration of conveyances and liens affecting the title to aircraft, Congress has preempted that field and state recording statutes are not applicable to such title instruments. However, questions of the validity of such title documents, actual notice, good faith purchaser status, and the like, must be resolved under state law.

"In Bordman Invest. Co. v. Peoples Bank of Kansas City, Mo. App., 320 S.W.2d 72, 76-77, the court held in part as follows:

'In almost all jurisdictions the recognized rule is that where a mortgagee of an automobile or other chattel knows the mortgagor is a dealer, buying to sell the automobile or other chattel in the regular course of business, and consents to its sale by the mortgagor, the purchaser takes free from the mortgagee's lien. . . .

'In such situations, as between an owner or mortgagee who entrusts the chattel to another for purposes other than a complete sale and the one who buys the chattel from the latter without notice of the seller's lack of authority to sell, the courts have evolved the estoppel theory based on the maxim that, as between two innocent victims of fraud, the one who makes possible the fraud on the other should suffer. It is felt that under such circumstances a purchaser in good faith of a motor vehicle from the stock in trade of a recognized dealer is not bound to investigate the dealer's title in anticipation of the unknown claims of a mortgagee or seller of such vehicle who should be aware of the danger of the buying public being misled and has made the situation possible by permitting the dealer to have the automobile in his stock in trade.'"

355 F.2d, p. 229

Northern Illinois Corporation v. Bishop Distributing Co., et al., USDC Mich. 1968, 284 F.Supp. 121, involved the same situation and decision as *Texas National Bank*, supra, with quotations from the Uniform Commercial Code (§ 9-307 supra), and the "Comment" to § 9-104, quoted supra. Also said opinion states:

"Plaintiff argues that because aircraft are much more costly than household goods or cars, a buyer of an aircraft should be required to conduct an aircraft title search. In this respect, plaintiff contends that all that would have been required of the defendants would have been for them to check with the Federal Aviation Agency in Oklahoma City, Oklahoma.

"[9] We question whether the price of goods should determine the duties and obligations of the buying public. Plaintiff was aware that Mich-Air Mooney, Inc. purchased the aircraft in order to sell it.

"[10-13] Although both plaintiff and defendants are innocent parties to a very unhappy chain of events, in determining who should bear the loss we conclude that buyers in the ordinary course of business should not be required to act at their peril. As Chief Judge Henley said in Texas National Bank of Houston, supra:

'Ordinarily, when a person goes into a merchant's place of business to make a purchase, whether it be of an automobile, a television set, a washing machine, or a pound of nails, the purchaser ought to have the right to assume that the merchant has a right to sell the commodity in question and should not be required to make a record search before purchasing or to see to it that the merchant obtains a valid release of the item from a bank floor plan before delivering it to the purchaser and

receiving his money or obligation. The Court sees no reason why that right should not extend to the purchaser of an airplane who buys it from a recognized dealer from a regular inventory or display and in the ordinary course of business. 235 F.Supp. at 604."

284 F.Supp., p. 125

United States Aviation Underwriters v. WTAE Flying Club, et al., U.S.D.C. Penn. 1969, 300 F.Supp., 341, was an interpleader suit to determine right to proceeds of insurance policy on an aircraft which was encumbered with a duly recorded lien at the time it was purchased from a dealer. The District Court awarded proceeds to the purchaser on grounds of misconduct of the lienholder and said:

"[8] Steensen was a buyer of the Cessna in the ordinary course of business. A buyer in the ordinary course of business is one who in good faith and without knowledge that the sale to him is in violation of the ownership rights or the lien of a third party in the goods, buys in ordinary course from a person in the business of selling goods of that kind. Steensen was such a buyer."

300 F.Supp., p. 348

In *Suburban Trust & Svgs. Bank v. Campbell*, CCP Ohio 1969, 10 Ohio Misc. 74, 250 N.E.2d 118, the rights of a purchaser in ordinary course of business were held superior to the lien of a chattel mortgage executed by the dealer after the sale to renew a prior mortgage recorded before the sale. Although decided on principles of novation, the opinion also supports the superior rights of the purchaser of an airplane in ordinary course of business.

In *Southern Jersey Airways, Inc. v. National Bank of Secaucus*, N.J. App. 1970, 261 A. 399, there was a contest between the holder of an unrecorded mechanic's lien in possession and the holder of a prior mortgage duly recorded with the F.A.A. The New Jersey Appellate Division held in favor of the mechanic and said:

"[5-7] Thorough study of the matter convinces us that Congress did not intend by adoption of the cited recordation procedure necessarily to displace and preempt all state law otherwise applicable bearing upon priorities of lien and title interests in aircraft. Rather was it the intent, in relation to aircraft, to substitute for the multiplicity of state registration or recording systems a single preemptive federal system for registering (1) instruments of title, comparable to state registration of titles to motor vehicles, and recording (2) security documents of the kinds commonly comprehended by state recording laws concerning written consensual security interests affecting personal property. The reason was that the ready mobility of aircraft and their common use across state lines made it cumbersome and burdensome for persons having concern with the title to or incumbrances on aircraft to have to record or search in all states or localities which could arguably be claimed to constitute the proper recording situs in relation to the specific owner or incumbrancer of a particular aircraft. See Scott, 'Liens in Aircraft: Priorities,' 25 J. Air L. & Com. 193, 200, 203 (1958); Case Note, 48 Colum. L. Rev. 1248 (1948). Thus, failure to federally record a recordable instrument would entail the specific consequences declared by § 1403(c), but no other. Federal recording would validate a title or incumbrance as against any claim of invalidity based upon absence of state recording, but would not neces-

sarily create affirmative priority as against competing rights declared by applicable state law.

* * *

". . . Professor Gilmore's authoritative text states:

The several provisions summarized above obviously amount to a good deal more than a recording system (like the patent and copyright provisions) but are still a good deal less than a comprehensive coverage of security interests in aircraft; they are much less comprehensive than the Ship Mortgage Act, which goes into great detail on the formal requisites and priorities of ship mortgages and includes sections on foreclosure and on the status of mortgages on foreign flag ships. There is of course no plenary federal power over air transportation comparable to the patent and copyright powers or even to the extention [*sic*] of the 'judicial power of the United States' to admiralty and maritime cases. Here Congress acts under the interstate commerce and the bankruptcy powers—which have, however, become so extensive that there is not likely to be any constitutional challenge to anything Congress has done or may do in the future. A truly comprehensive security statute for aircraft—or indeed a statute covering security interests in transportation equipment of any kind, by air, rail, road and water—would undoubtedly be within the power of Congress to enact; there is, however, little likelihood that such a federal preemption of the field will take place in the near future. [1 Gilmore, Security Interests in Personal Property, § 13.5, at 423 (1965).]

"Except for the engine and spare parts liens, § 503 is not in any sense a substantive statute. Therefore, it is believed, apart from these substantive provisions, the question of formal requisites,

and the operation of the recording system, state law should apply to determine any question arising in connection with a security interest in aircraft. The argument for a federal law solution is even weaker here than under any of the other federal statutes we have so far discussed: § 503 is much less comprehensive than the Ship Mortgage Act and there is not the same federal source of power that could be alleged in favor of a federal solution in the fields of copyright, patent and admiralty law. The cases decided under § 503 all seem to assume that state law is generally applicable and that § 503 is clearly an 'interstitial' statute, which goes as far as it goes but no further. [Id., at 426-427]

"Striking a similar note is Scott, *supra*, 25 J. Air L. & Com., at 202, wherein, after discussing the case holding the federal act constitutionally applicable to aircraft used solely in intrastate commerce, the writer says:

"**Meaning of Section 503** [now § 1403]. Accepting the constitutional validity of the section, we are then faced with the more important question—what priority in right is obtained by a security holder through federal recordation? Clearly it is not axiomatic that recordation assures priority as to subsequent lienors, and the statutory language cannot be construed in such a way as to leave the matter free from doubt. The statute merely provides that conveyances or other instruments filed for recordation shall be valid as to all persons . . . . It does not speak in positive terms of priority, as does for instance the Ship Mortgage Act of 1920 discussed above.

"Most of the decisions having to do with the federal act have been careful to delineate its recording provisions as preemptive and exclusive only in

respect of place and requirements of recording and the effect of failure to record a federally recordable conveyance or instrument as to subsequent bona fide purchasers or lienors without notice. Aircraft Investment Corp. v. Pezzani & Reid Equipment Co., 205 F.Supp. 80, 82 (E.D. Mich. 1962); American Aviation v. Aviation Insurance Managers, Inc., 244 Ark. 829, 427 S.W.2d 544, 547 (Sup. Ct. 1968); Blalock v. Brown, 78 Ga. App. 537, 51 S.E.2d 610, 9 A.L.R.2d 476 (Ct. App. 1949); State Securities Company v. Aviation Enterprises, Inc., 355 F.2d 225, 229, 22 A.L.R.3d 1263 (10 Cir. 1966); Marsden v. Southern Flight Service, Inc., 227 F.Supp. 411, 415 (M.D.N.C. 1961); cf. Lochhead v. G.A.C. Finance Corp. of Camelback, 6 Ariz. App. 539, 434 P.2d 655 (Ct. App. 1968); Curtis v. Carey, 393 S.W.2d 185, 189 (Tex. Ct. Civ. App. 1965).

* * *

"Plaintiff suggests that Congress has preempted the entire field of conveyancing of interests in aircraft. This view is erroneous, notwithstanding In re Veterans' Air Express Company, 76 F.Supp. 684 (D.N.J. 1948), which contains dicta on which plaintiff relies. Congress has said only that until an instrument purporting to convey an interest in an aircraft is recorded, in accordance with the Act, it is void as to third parties without notice. Upon federal recordation, it is valid without further recording. [205 F.Supp., at 82]"

261 A.2d, pp. 403, 404, 405

In *Dowell v. Beech Acceptance Corp.*, Calif. 1971, 476 P.2d 401, the California Supreme Court, relying principally upon decisions of the California Court of Appeals, determined that a lien upon part of an aircraft dealer's stock in trade, duly recorded with F.A.A., was superior to the claim of a purchaser in ordinary course of business.

The California Court was of the opinion that the federal statute did preempt all phases of lien law in respect to aircraft and thereby created an exception to the provisions of U.C.C. as to purchasers in ordinary course of business. The same opinion relies upon the annotation in 22 A.L.R.3d 1270. The pertinent portion of said annotation is § 12(b), pp. 1292 and 1293 wherein only two cases are mentioned. One is *Dawson v. General Discount Corp.*, 82 Ga. App. 29, 60 S.E.2d 653 (1950), which was not based upon the U.C.C. protection of purchasers (from a dealer) in ordinary course of business. The unsuccessful defendant, Dawson, purchased the plane from an individual who had not satisfied the lien of a duly recorded conditional sales contract.

The only other case mentioned in said annotation is *Texas Nat. Bk. v. Aufderheide*, a 1964 case already discussed, wherein the rights of the purchaser were upheld.

The Dowell decision also relies upon three U.S. District Court decisions and two State decisions which involve superiority of recorded liens over unrecorded mechanics liens and one State decision involving superiority of prior recorded chattel mortgage over subsequently recorded chattel mortgages. None of the out-of-state authorities relied upon in *Dowell* involves the rights of a purchaser in ordinary course of business from a dealer.

Dowell does recognize *Northern Ill. Corp. v. Bishop Co.* and *Texas National Bank v. Aufderheide*, supra, but "simply declines to follow them."

Dowell ignores *State Securities Co. v. Aviation Enterprises Inc.* (U.S. Court of Appeals), *U.S. Aviation Underwriters v. WTAE Flying Club* (U.S. District Court, Mich.), and *Southern Jersey Airways v. National Bank of Secaucus* (New Jersey Appellate Div.), all discussed supra.

Subsequent decisions have been contrary to the holding of *Dowell.*

In *Carolina Aircraft Corp. v. Commerce Trust Co.* (Fla. App. 1974), 289 So. 2d 37, the lien of a mechanic in possession was held to be superior to that of a prior recorded mortgage.

To the same effect is *Industrial National Bank of Rhode Island v. Butler Aviation International Inc.*, U.S.D.C. E.D. NY-1974, 370 F.Supp. 1012.

In *Idabel National Bank v. Tucker*, Okla. App. 1975, Cert. Den. by Okla. Supr. Ct., the title and right of a purchaser in ordinary course of business was held to be superior to that of a bank holding a prior recorded mortgage from the dealer. After quoting applicable and persuasive portions of the legislative history of the U.S.C.A. § 1403, the Oklahoma Court adopts the language of *Texas National Bank v. Aufderheide*, supra as follows:

> "Ordinarily, when a person goes into a merchant's place of business to make a purchase, whether it be of an automobile, a television set, a washing machine, or a pound of nails, the purchaser ought to have the right to assume that the merchant has a right to sell the commodity in question and should not be required to make a [second] search before purchasing or to see to it that the merchant obtains a valid release of the item from a bank floor plan before delivering it to the purchaser and receiving his money or obligation. The Court sees no reason why that right should not extend to the purchaser of an airplane who buys it from a recognized dealer from a regular inventory or display and in the ordinary course of business."
>
> 544 P.2d, p. 1291

From the foregoing, it is evident that the proper disposition of the issue is not without doubt.

Appellee relies upon only one authority, *Dowell*, and for grounds states that all other authorities are ill considered and that *Dowell* is dominant because the U.S. Supreme Court denied certiorari in that case.

The denial of certiorari by the United States Supreme Court cannot be ignored, but its action (or inaction) must be considered in the light of the repeated assertions of that Court that its denial of certiorari is not proper basis for unwarranted inferences of what the holding of the Court might have been had it granted certiorari. It is also significant that *Dowell* preserved and extended the encroachment of federal law in the state field of commercial law, rather than restricting the application of federal law. State decisions of the former type have been rarely reviewed by the U.S. Supreme Court, whereas decisions of the latter type have been more frequently reviewed.

California appears to stand alone in its insistence that a customer who buys an airplane out of the stock of a dealer must carry out a "title search" for recorded "floor plan" liens.

This Court prefers to follow the rule announced in all other decisions that the rights of a purchaser from a dealer in ordinary course of business are superior to the holder of a lien upon a moving stock of planes in the hands of a dealer. There are a number of reasons why this decision is preferable.

1. The Uniform Commercial Code has brought uniformity and order to the field of commercial law. To graft a new class of exceptions upon the existing uniform

law would reverse the wholesome intent and result of the law.

2. It is not reasonable to assume that Congress intended any such result where not clearly stated.

3. The proliferation of aircraft dealerships and aircraft purchases would be seriously hampered if the public were not allowed to trust dealers selling in ordinary course of business.

4. It is inequitable and unjust to allow a mortgagee to hold "secret liens" on chattels while authorizing the chattels to be exhibited for sale by a dealer to the deception and loss of the purchasing public.

5. Lienholders may protect themselves (if they desire) by impounding the mortgaged planes in locked surroundings inconsistent with the free-sale situation of a stock of merchandise.

For the reasons and under the authority stated, the decree of the Chancellor is reversed, the plaintiff's suit against Red Baron Flying Club, Inc., is dismissed, and all costs, including costs of this appeal, are taxed against the plaintiff.

Reversed and Dismissed.

/s/ Henry F. Todd, Judge

SHRIVER, P. J., CONCURS

DROWOTA, J., DISSENTS

Filed: December 2, 1977

BANK OF HENDERSONVILLE, *Plaintiff-Appellee*	:	
vs.	:	PUTNAM EQUITY
RED BARON FLYING CLUB, INC., et al., *Defendants-Appellants*	:	

DISSENT

I respectfully dissent from the conclusion reached in the majority opinion that the purchaser of an aircraft who qualifies as a "buyer in ordinary course of business" under T.C.A. § 47-9-307 is protected by that statute from the claim of one holding a security interest recorded under 49 U.S.C. § 1403 prior to the sale. While the issue is obviously not free from doubt and while the force of many of the policy considerations espoused by the majority in favor of the U.C.C. rule cannot be gainsaid, I believe that Congress intended in § 1403 to set up a rule of priority that controls the instant situation, and that we should follow *Dowell v. Beech Acceptance Corp., Inc.*, 3 Cal. 3d 544, 475 P.2d 401, 91 Cal. Rptr. 1 (1970).

The Court in *Dowell* furnishes a reasoned explanation of its conclusion that 49 U.S.C. § 1401 *et seq.* pre-empt state priority rules and render the rights of the holder of a security interest recorded under § 1403 prior to the sale of an aircraft superior to those of one who buys the aircraft in the "ordinary course of business" within the meaning of U.C.C. § 9-307. In addition, a reading of the federal provisions themselves seems to me to require this result. Section 1403(a) sets out the types of interests

recordable under the statute, and its language encompasses the security interest involved in the instant case. Section 1403(c) provides that no instrument recordable under the statute shall be "valid" except against "the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof" until it is recorded as provided in the statute. The effect of proper recording is stated by § 1403(d) to be as follows:

> (d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be *valid as to all persons* without further or other recordation. . . . [Emphasis added.]

That "valid" does not refer to the inherent validity of the recorded instrument itself is shown by the express commitment of that issue to state law in § 1406. The most logical explanation of § 1403(d), then, is that recording an instrument makes it "valid as to all persons" in the sense that its holder acquires rights superior to those acquired by subsequent persons such as purchasers.

The priority conferred by recording under § 1403 is very similar to that given recorded deeds of real property under the theory of constructive notice. The similarity is brought out by a description of the effect of § 1403 recording in the legislative history of the 1964 amendment to § 1401 *et seq.* It is there stated that, when an instrument has been properly recorded under the statute,

> . . . all persons are deemed to have notice of its existence and its effect on title to the property covered thereby. Consequently, to determine whether there are any encumbrances on the aircraft, it is only necessary to consult the central file.

1964 U.S. Code Cong. & Adm. News 2320. In my view, this strengthens the conclusion that the rights of one who has recorded a security interest under § 1403 are superior to those of a subsequent purchaser of the encumbered aircraft.

Much of the policy in favor of protecting one who purchases in the ordinary course of business is sound, and has been widely accepted by state courts and by state legislatures adopting the U.C.C. Nevertheless, 49 U.S.C. § 1403 evidences Congress's intent to reverse this rule in the case of security interests in aircraft which are recordable under the statute. Congress has chosen to give priority to the secured party rather than the buyer in such cases by applying its own uniform rule, a rule not subject to change by the legislatures of the several states. This uniform federal rule simply removes the priority question from determination under the U.C.C. when certain aircraft are involved, rather than "grafting exceptions" onto the Code as the majority suggest. The principle of federal supremacy, recognized in T.C.A. § 47-9-104, requires that this federal priority rule replace conflicting state rules of priority with regard to aircraft.

Further, the buyer's burden of checking the federal record in such cases is a light one. This is especially so when it is compared to the steps a secured party would have to take, such as locking up the aircraft, to protect himself under the majority's approach. Far from being "secret," any interest recorded under § 1403 is readily available for anyone to see. Finally, it is again pointed out that the similar system of "constructive notice" in real property recording, under which a subsequent purchaser would not take free of previously recorded instruments in his chain of title, has worked reasonably well and is not generally considered to be unfair.

In sum, I find in 49 U.S.C. § 1401 *et seq.* an intent to prefer the rights of a secured party such as plaintiff over those of a buyer in the ordinary course of business such as defendant in the circumstances of the instant case. The *Dowell* Court was correct in saying that

> . . . [t]he federal policy to foster recordation and to protect recorded interests is eviscerated by a rule which relies on state laws to protect the buyer in the ordinary course of business even though he fails to undertake a simple title search which would have readily revealed all encumbrances.

476 P.2d at 406, 91 Cal. Rptr. at 6. We should not frustrate the federal purpose of encouraging recording of interests in aircraft and disregard the intent of Congress by reading state laws of priority such as U.C.C. § 9-307 into the federal scheme.

/s/ Frank F. Drowota, III, Judge.

Filed: December 2, 1977

IN THE CHANCERY COURT FOR
PUTNAM COUNTY, TENNESSEE

BANK OF HENDERSONVILLE, *Plaintiff,*	:	
versus	:	CIVIL ACTION NO. 1002
MID-SOUTH AVIATION, INC., RED BARON FLYING CLUB, INC., and CITIZENS BANK OF COOKEVILLE, TENNESSEE, *Defendants.*	:	

MEMORANDUM OPINION

The issue to be determined in this case is that of whether a party which provides financing for a seller and lessor of aircraft will prevail over a purchaser of an aircraft from the borrower's inventory where no attempt is made to determine if there is a valid security interest in the aircraft owned by someone else.

Most excellent briefs have been filed by eminent counsel on each side of the case. Comprehensive Stipulation of Facts has been filed. This stipulation includes the pertinent exhibits.

I have read and studied the briefs filed by respective counsel with a great deal of interest. I am of the opinion that our Uniform Commercial Code 9-307, TCA, 47-9-307, which purports to protect "purchasers in the ordinary course of business" does not apply to this transaction but that to the contrary the provisions of

the Federal Aviation Act, 49 U.S.C., et seq., have pre-empted the state law and require protection for the owner of the admittedly validly perfected security instrument at the time of the sale to the Red Baron Flying Club, Inc.

It results therefore that the complaint of the Bank of Hendersonville is sustained. Counsel will prepare a final decree for my signature in accord with this Memorandum Opinion.

Done at Sparta, Tennessee, on this the 22nd day of December, 1976.

/s/ SCOTT CAMP, Chancellor

[Certificate of Service Omitted in Printing]

Supreme Court, U. S.
FILED
DEC 1 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-720

BANK OF HENDERSONVILLE,
Petitioner

v.

RED BARON FLYING CLUB, INC.,
Respondent

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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STATEMENT OF FACTS

The facts are uncontroverted. Mid-South Aviation, Inc., an aircraft dealer, sold to Red Baron Flying Club, Inc., (Respondent herein) the subject aircraft out of its (Mid-South's) stock of several aircraft. The plane was paid for by a cashier's check. At the time of the sale, the Bank of Hendersonville (petitioner herein) held a floor-plan or inventory security interest upon a number of Mid-South's aircraft including the subject plane. Mid-South failed to satisfy the inventory security interest of petitioner. Mid-South subsequently was adjudicated a bankrupt.

The Bank of Hendersonville initiated this cause of action to enforce its lien against the subject airplane. Red Baron claims the status of purchaser for value in the ordinary course of business under the Uniform Commercial Code, Tennessee Code Annotated 47-9-307.

The security interest of the Bank of Hendersonville was, at all pertinent times duly recorded with the FAA Aircraft Registry in Oklahoma City in accordance with 49 U.S.C. §§1401-1406.

HISTORY OF THE CASE

1. June 4, 1975, Complaint by Bank of Hendersonville for Possession and balance due on Aircraft filed in the Putnam County, Tennessee Chancery Court as Cause No. 1002. Defendants named therein, Mid-South Aviation, Inc., (the dealer), Red Baron Flying Club, Inc., (the purchaser for value from the dealer) and Citizens Bank of Cookeville, Tennessee (who financed the purchase for the Red Baron).

2. October 10, 1975, Complaint dismissed as to Citizens Bank of Cookeville, Tennessee.

3. December 22, 1976, Memorandum Opinion by Chancery Court at Putnam County.

4. January 14, 1977, Final Decree of Chancery Court of Putnam County, Tennessee. Held that the security interest of the Bank of Hendersonville was superior to any interest of the defendant Red Baron Flying Club, Inc., and gave judgment for the Bank of Hendersonville against Red Baron Flying Club, Inc., for $13,759.59 and the costs of the cause.

5. Case appealed by the Red Baron to the Court of Appeals for the Middle District of Tennessee in Nashville, Tennessee.

6. December 2, 1977, Court of Appeals reversed the Chancery Court decision and dismissed the suit of the Bank of Hendersonville against Red Baron Flying Club, Inc.

7. The Bank of Hendersonville filed a Petition for Certiorari for review of the case by the Tennessee Supreme Court.

8. July 31, 1978, Supreme Court of the State of Tennessee denied, per curiam, the Petition for Certiorari.

9. Petition for Certiorari filed by the Bank of Hendersonville with the United States Supreme Court.

ISSUE SUCCINCTLY STATED

The issue succinctly stated is:

WHETHER AN AIRCRAFT DEALER'S INVENTORY FLOOR PLAN SECURITY INTEREST, DULY PERFECTED UNDER THE FAA ACT OF 1958, SURVIVES A SALE TO A PURCHASER IN ORDINARY COURSE OF BUSINESS FROM THAT DEALER.

ISSUE STATED AS A LEGAL QUESTION

Stated in terms of the legal question, the issue is:

WHETHER THE FAA ACT OF 1958 PREEMPTS STATE LAW (THE UNIFORM COMMERCIAL CODE, TENNESSEE CODE ANNOTATED §47-9-307) WHICH GIVES A BUYER IN THE ORDINARY COURSE OF BUSINESS GOOD TITLE EVEN THOUGH THERE WAS A PERFECTED SECURITY INTEREST IN THE AIRCRAFT IN THE HANDS OF THE DEALER.

THE UNIFORM COMMERCIAL CODE

The Uniform Commercial Code has been adopted in 49 of the states (Louisiana, the 50th state, has adopted a portion of it) and the District of Columbia. The Uniform Commercial Code provides the method of perfection for security interest in personal property (T.C.A. 47-9-102) except as is otherwise provided in T.C.A. 47-9-104 which excludes certain transactions. The exceptions set out in T.C.A. 47-9-104 include the following:

> "47-9-104. TRANSACTIONS EXCLUDED FROM CHAPTER.—This chapter does not apply.
>
> (a) To a security interest subject to any statute of the United States such as the Ship Mortgage Act, 1920, *to the extent that such statute governs the rights of parties to and third parties affected by Transactions and particular items of property;* (emphasis added) . . .

Both the Uniform Commercial Code and the earlier common law protect the rights of purchasers of goods from a stock of merchandise of that kind against the claims of the inventory secured party of the selling merchant. Under the earlier common law, a bona fide purchaser for value from a merchant took good title, clear of the inventory mortgage or inventory trust receipt which might have

been given by that merchant. The Uniform Commercial Code contains the same protection. It is set out in Article IX, §307 as follows:

> "47-9-307. PROTECTION OF BUYERS OF GOODS. —A buyer in ordinary course of business (subsection [9] of §47-1-201) other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by a seller even though the security interest is perfected and even though the buyer knows of its existence."

The term "buyer in the ordinary course of business" is defined in the Uniform Commercial Code in the following language:

> "47-1-201. GENERAL DEFINITIONS.—Subject to additional definitions contained in chapters 2 through 9 of this title which are applicable to specific chapters or parts thereof and unless the context otherwise requires, in chapters 1 through 9 of this article:
>
> . . . (9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods he buys in the ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as a security for or in total or partial satisfaction of a money debt."

FEDERAL AVIATION ACT OF 1958

The Federal Aviation Act of 1958 (49 U.S.C. §§1401-1406) was essentially a reenactment of the 1938 Civil Aeronautics Act. In 1964 there was a change in the 1958 Act to delete from §1406 the requirement of acknowledgements on instruments. This is the most recent amendment

to the FAA Act of 1958. Surrounding the 1964 enactment, there is a good deal of legislative history which gives some excellent insights to the application Congress intended for the FAA Act of 1958. For the convenience of this Court, the legislative history as taken from the U.S. Code and Administrative News for 1964, Vol. II, Pages 2322 through 2326 are set out in the Appendix hereto. One item in this legislative history is a letter to the Honorable Warren G. Magnuson from N. E. Halaby, Administrator of the FAA. At Page 2323 (Appendix Page 16) he points out that:

> "While recordation does afford notice to the world of the existence of an instrument affecting title, *it does not purport to establish the substantive validity of the instrument. As in the case with other recording systems, substantive validity of a recorded instrument remains a question of local law.*" (Emphasis added.)

The precise issue in the instant case is the validity of an inventory security interest as against a "purchaser in ordinary course of business."

The next letter in the legislative history is from the Honorable Robert E. Giles, General Counsel of the Department of Commerce. (Appendix Page 18). In his letter he says:

> "The principal purpose of H. R. 8673 is to amend Title V of the Federal Aviation Act of 1958 by adding a new section providing that *the validity of any credit instrument affecting title to or interest in civil and related equipment, the recording of which is provided for under section 503 of the Act, shall be governed by the place in which such instrument is delivered.*" (Emphasis added)

The last letter in the legislative history is from G. D'Andelot Belin, General Counsel for the Treasury Department (Appendix Page 19). His discussion is addressed

to the matter of Federal tax liens, and it merits noting that Federal tax liens, locally filed (in the place required by state law for the notation of liens on real estate of the taxpayer) prime any filing or recording with the FAA.

The fact that the United States Congress created a central place in which security interest in a highly mobile piece of equipment such as an airplane could be filed, in no wise changed the effect of the perfection. The Federal Aviation Act is absolutely silent as to many aspects of secured transactions. It contains no procedures for foreclosure. It is silent as to priority of claims, says nothing about the ultimate effect of recordation as to third parties. The official code comment to T.C.A.-47-9-104(a) says it clearly:

> "BUT TO THE EXTENT THAT THE FEDERAL AVIATION ACT DOES NOT REGULATE THE RIGHTS OF PARTIES TO AND THIRD PARTIES AFFECTED BY SUCH TRANSACTIONS, SECURITY INTERESTS IN AIRCRAFT REMAIN SUBJECT TO THIS ARTICLE."

REPORTED CASES SPECIFICALLY ON POINT

There are currently eleven reported cases that involve the precise question in the instant case.

Texas National Bank of Houston v. Aufderheide, 235 F.Supp. 599 (E.D. Ark. 1964).

States Securities Company v. Aviation Enterprises, Inc., 355 F.2d 225, CA-10 (1966).

Northern Illinois Corp. v. Bishop Distributing Co., 284 F.Supp. 121 (W.D. Mich. 1968).

United States Aviation Undre., Inc. v. WTAE Flying Club, 300 F.Supp. 341 (W.D. Tenn. 1969).

Suburban Trust & Savings Bank v. Campbell, 250 N.E. 2nd 118 (Ohio 1969).

Dowell v. Beech Acceptance Corp., Inc., 476 p.2d. 401 (1970), *cert. denied*, 404 U.S. 823 (1971).

Idabell National Bank, Idabell v. Tucker, 544 P.2d 1287 (Okla. App. 1975), *cert. denied.*

Haynes v. GECC, 423 F.Supp. 763 (W.D. Va. 1977).

Bank of Hendersonville v. Red Baron Flying Club, Inc., (Tenn. App., Middle Section, Nashville, Dec. 2, 1977, Cert. Denied Tenn. Sup. Ct., July 31, 1978) 571 S.W.2d 152.

Sanders v. M.D. Aircraft Sales, Inc., 23 U.C.C. Rep. 1316 (3d Cir., May 3, 1978), 575 F.2d 1086.

Cessna Fin. Corp. v. Skyways Enterprises, Inc., 23 U.C.C. Rep. 1015 (Ky. App., April 21, 1978).

Of these eleven cases ten held that there was no conflict between the Uniform Commercial Code and the Federal Aviation Act of 1958. They held that the FAA Act preempted state law only to the extent of providing a central place of recordation. The cases held that where the Federal Aviation Act was silent, such as on the issue of priorities between various claimants or lienholders or the validity of an instrument asserting a floor-plan security interest against the goods in the hands of a purchaser for value in ordinary course of business, one must look to the state law for answers.

The only case out of step with all the others is the *Dowell* case. In *Dowell*, California appears to stand alone in its insistence that a customer who buys an airplane out of the stock of a dealer must carry out a "title search" from recorded "floor plan" liens.

An airplane is a highly mobile piece of equipment. It is therefore obvious that Congress was undertaking to provide a central method and place of recording security in-

terests on aircraft. Although Congress could have preempted state law with reference to validity of security interests, priority of conflicting interests, etc., Congress has not chosen to act in that regard. Congress left the decision as to such matters to state law. That the State of California has chosen to subordinate its laws to a Federal statute (which was actually silent on the point in issue) is really no contradiction to the total unanimity of every other opinion on the subject.

In the instant case, the Tennessee Court of Appeals summarized its position as follows:

> "This Court prefers to follow the rule announced in all of the decisions (other than Dowell) that the rights of a purchaser from a dealer in ordinary course of business are superior to the holder of the lien upon a moving stock of planes in the hands of a dealer. There are a number of reasons why this decision is preferable.
>
> (1) The Uniform Commercial Code has brought uniformity and order to the field of commercial law. To graft a new class of exceptions upon the existing uniform law would reverse the wholesome intent and result of the law.
>
> (2) It is not reasonable to assume that Congress intended any such result where not clearly stated.
>
> (3) The proliferation of aircraft dealerships and aircraft purchases would be seriously impaired if the public were not allowed to trust dealers selling in ordinary course of business.
>
> (4) It is inequitable and unjust to allow a mortgagee to hold "secret liens" on chattels while authorizing the chattels to be exhibited for sale by a dealer to the deception and loss of the purchasing public.
>
> (5) Lien holders may protect themselves (if they desire by impounding the mortgaged planes in locked surroundings inconsistent with the free-sales situation of the stock of merchandise.

To all of this, respondent can only add that, where the Federal law speaks, it preempts state law. Where the Federal law is silent, the Courts must look to state law. Traditionally, all states have guarded the rights of purchasers for value in the ordinary course of business for many years and have now incorporated that attitude into the Uniform Commercial Code. There is nothing in the Federal Aviation Act which either requires or justifies any change from that position.

Respondent therefore respectfully asserts that the judgment of the Tennessee Court of Appeals was completely correct. That judgment was affirmed by the Tennessee Supreme Court by the per curiam denial of the petition for certiorari. It is suggested that there is no matter which should be reviewed by this court and therefore the petition for certiorari should be denied.

Respectfully submitted,
Ernest Williams, III
Attorney for Respondent
Red Baron Flying Club, Inc.

OF COUNSEL:
HEISKELL, DONELSON, ADAMS,
WILLIAMS & KIRSCH
2020 First Tennessee Building
Memphis, Tennessee 38103

AVIATION—RECORDING OF INSTRUMENTS

For text of Act see p. 281

Senate Report (Commerce Committee) No. 1060, June 5, 1964 [To accompany H.R. 8673]
House Report (Interstate and Foreign Commerce Committee) No. 1033, Dec. 12, 1963 [To accompany H.R. 8673]
Cong. Record Vol. 109 (1963)
Cong. Record Vol. 110 (1964)

DATES OF CONSIDERATION AND PASSAGE

House Dec. 17, 1963
Senate June 19, 1964
The Senate Report is set out.
Senate Report No. 1060

The Committee on Commerce, to whom was referred the bill (H.R. 8673) to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE OF THE BILL

The bill would create a uniform Federal rule which would provide that the validity of certain instruments affecting title to or interest in aircraft shall be governed by the laws of the State, District of Columbia, territory, or possession in which they are delivered. Designation of the place of delivery in the instrument would constitute presumptive evidence that the instrument was delivered at the place so specified. The bill makes clear that this legislation in no way affects the Convention on the International Recognition of Rights in Aircraft. In addition, the Administrator of the Federal Aviation Agency would be authorized to except certain instruments from the present statutory requirement that they must be notarized before recordation.

ANALYSIS AND NEED FOR LEGISLATION

The bill is similar in purpose to S. 2773, 87th Congress, which was reported favorably by this committee September 4, 1962, and which passed the Senate September 7, 1962. This legislation incorporates recommendations originally proposed by the Bar Association of

the City of New York and is designed to facilitate identification of local laws governing the validity of aircraft instruments. It establishes a uniform Federal rule governing the validity of instruments affecting title to or interests in aircraft and related equipment. The rule would apply to all instruments subject to the recording provisions of section 503 of the Federal Aviation Act. Included would be various instruments executed for security purposes such as conveyances, leases, mortgages, equipment trusts, conditional sales contracts, etc. Assignments, amendments, and supplements to such instruments would similarly be covered. To determine the validity of such an instrument, one would need only to look to the substantive law of the particular State in which the relevant instrument was delivered.

The fact that the determination of the validity of aircraft conveyances involved extremely cumbersome and complex procedures was recognized by the Congress when it originally enacted the Civil Aeronautics Act of 1938. That act contained a provision which provided for the establishment of a central national recording system for all instruments affecting title to or interest in civil aircraft of this country. This provision was incorporated in section 503 of the Federal Aviation Act of 1958 substantially without change. It contained the previously established recording system and provides that no conveyance or instrument affecting aircraft shall be valid until filed for recordation except as to parties to the instrument or persons with actual knowledge of its existence. When the instrument has been filed for recordation under the law, all persons are deemed to have notice of its existence and its effect on title to the property covered thereby. Consequently, to determine whether there are any encumbrances on the aircraft, it is only necessary to consult the central file.

While existing law has assisted materially in facilitating the determination as to the validity of instruments, it does not establish the substantive validity of the instrument as proposed by this measure. Considerable doubt and confusion still exist in this field. The laws of the various States differ quite substantially with respect to the validity of various instruments. In attempting to resolve the issue as to which jurisdiction's laws should apply in determining such an instrument's validity, it is arguable that the law of one of three of the following jurisdictions is applicable: The jurisdiction in which the property is located; the jurisdiction in which the parties reside; or the jurisdiction in which the instrument was executed and delivered. As an example of the needless com-

plexities and difficulties in making such a determination, suppose an airline desired to refinance its fleet of aircraft: each of the three rules governing jurisdiction would have to be covered. With respect to the first, for example, it would be necessary to know the exact location of every aircraft at the precise moment the refinancing instrument was executed. Pinpointing the exact location of aircraft, many of which today fly at speeds well in excess of 500 miles an hour, is extremely difficult and at times impossible. Such unnecessary and costly procedures which one must now go through to determine the validity of aircraft instruments would be remedied by this legislation. The bill selects, and the committee is convinced, most logically, the place where the instrument is delivered. Consequently, the prospective purchaser would not only be able to readily ascertain whether encumbrances are recorded against an aircraft but would in addition be in the position to assess the validity of any instruments affecting the aircraft's title by simply consulting the law of the place where the instruments were delivered.

The bill also amends section 503(e) of the Federal Aviation Act which provides that no instrument shall be recorded unless acknowledged before a notary public. This acknowledgement requirement is unnecessarily burdensome and directed to no useful end when applied to certain conveyances and instruments which do not normally depend for validity upon acknowledgement to establish their authenticity. This would include various governmentally issued documents such as judicial decrees. Certified copies of these official records are presently admissible in the courts to determine private rights by virtue of rule 44 of the Federal Rules of Civil Procedure. Consequently, more stringent proof of authenticity is unnecessary. The committee is advised that the Federal Aviation Agency has received numerous complaints from various private citizens and Government officials to the effect that this procedure is cumbersome and unnecessary. The Agency, of course, was not in a position to remedy the situation since the procedure is specifically required by statute. Since no useful purpose is served by requiring the inclusion of certain instruments in section 503(e) the bill authorizes the Administrator of the Federal Aviation Agency to except such instruments by regulation.

TAX LIEN PROPOSAL

The Internal Revenue Code (26 U.S.C. 6321, 6323) provides that notices of Federal tax liens shall be filed with the U.S. district court or the office provided by State law in the jurisdiction where

the taxpayer's property is located. The Internal Revenue Service has, as a matter of practice, only filed its notices of tax liens locally and not with the Federal Aviation Agency. It has been contended by some that the Federal Aviation Act requires the Service to file tax liens with the Federal Aviation Agency. In order to clarify this point, the Treasury Department proposed that the committee adopt in this bill an amendment to the Federal Aviation Act to specifically exclude tax liens from the recording provisions. The Air Transport Association, together with several airlines, strongly objected to the proposed amendment and expressed the view that it should be made the subject of separate hearings. While the committee appreciates the desire of the Internal Revenue Service to settle, by means of substantive legislation, the tax lien question, and agrees that this bill provides an appropriate vehicle for its resolution, the latter is extraneous to the basic objective of this legislation, viz., the establishment of a uniform Federal rule governing the validity of aircraft conveyances. Since the bill, without the amendment, is noncontroversial and provides a highly desirable clarification of law, the committee determined that it should be passed without delay. In so doing, the committee wishes to make unequivocally clear that its action should not in any way be interpreted as a judgment that the tax lien proposal either is or is not desirable or as a reflection on the validity of the arguments advanced in support thereof by the Treasury Department. The committee is simply deferring its decision in order to afford all interested parties the opportunity to fully express their views in open hearings in the near future.

CONCLUSION

The purpose of the bill is directed toward the unnecessary ambiguity, complexity, and time-consuming procedures involved in determining the validity of aircraft conveyances. Passage of this measure will minimize these problems and greatly facilitate the ease by which aircraft can be financed. The committee is convinced of the need for this legislation and accordingly urges its favorable consideration.

COST OF THE LEGISLATION

There will be no additional cost incurred by the Government as a result of favorable action on this legislation.

AGENCY COMMENTS

The Department of Justice had no comment on this bill.

The following written reports were received from Government agencies:

CIVIL AERONAUTICS BOARD
Washingon, D. C., January 14, 1964

Hon Warren G. Magnuson,
Chairman, Committee on Commerce,
U.S. Senate, Washington, D. C.

Dear Mr. Chairman: This is in reply to your letter of January 7, 1964, requesting the views of the Board with respect to H.R. 8673, an act to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes.

The provisions of the bill would not affect the functions and activities of the Board, but rather involve matters which are the responsibility of the Administrator of the Federal Aviation Agency. In these circumstances, the Board does not have any comments to offer with respect to the bill.

Sincerely yours,

ALAN S. BOYD,
Acting Chairman.

COMPTROLLER GENERAL OF THE UNITED STATES
Washington, January 17, 1964.

B—148101.
Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U. S. Senate.

Dear Mr. Chairman: Further reference is made to your letter of January 7, 1964, acknowledged on January 8, requesting the comments of the General Accounting Office concerning H.R. 8673, 88th Congress, 1st session, entitled "An act to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall

be governed by the laws of the place in which such instrument is delivered, and for other purposes."

We have no special information or knowledge as to the desirability of the proposed legislation and, therefore, we make no recommendation with respect to its enactment.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

FEDERAL AVIATION AGENCY,
Washington, D. C., January 17, 1964.

Hon. Warren G. Magnuson,
Chairman Committee on Commerce,
U. S. Senate, Washington, D. C.

Dear Mr. Chairman: This is in reply to your request of January 7, 1964, for the views of this Agency with respect to H.R. 8673, an act to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes.

Title V of the Federal Aviation Act establishes a central recording system for all instruments affecting title to or interest in civil aircraft of the United States. Section 503 provides that no conveyance or instrument affecting title to an aircraft shall be valid until filed for recordation, except as to parties to the instrument or those with actual notice of its existence.

While recordation does accord notice to the world of the existence of an instrument affecting title, it does not purport to establish the substantive validity of the instrument. As is the case with other recording systems, substantive validity of a recorded instrument remains a question of local law. Determining which local law applies to the instrument is extremely difficult, however, when one is dealing with highly mobile property such as aircraft. In the existing state of the law, therefore, the parties executing an instrument affecting aircraft, or prospective purchasers of aircraft seeking to determine the validity of encumbrances recorded against the property, may be faced with considerable uncertainty as to the State law applicable.

Section 1 of H.R. 8673 has as its sole purpose the identification of

the local law which will govern the validity of recorded instruments. It selects, we believe logically, the law of the place where the instrument was delivered. Thus, the prospective purchaser who finds an outstanding mortgage recorded against an aircraft will, by consulting the law of the place where the mortgage was delivered, be in a position to assess its validity. Likewise, the parties to a mortgage need only conform their instrument to the law of the intended place of delivery to insure its validity.

We believe H.R. 8673 has been carefully tailored to meet the precise problem presented, and we are in favor of its enactment. It will not interfere with our administration of the recording system and promises to increase the utility and effectiveness of that system.

Section 2 of H.R. 8673 amends present section 503(e) of the Federal Aviation Act of 1958, which requires that "no conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, Territory, or possession hereof, or the District of Columbia, to take acknowledgment of deeds."

This requirement is unnecessarily burdensome and directed to no useful end when applied to certain conveyances or instruments of title which are not normally and do not depend for validity upon being acknowledged before a notary public to establish their authenticity, for example governmentally issued documents such as judicial decrees. Under rule 44 of the Federal Rules of Civil Procedure, properly certified copies of these official records are admissible in courts of law to determine private rights. It seems unnecessary to require more stringent proof of authenticity for recording purposes.

The Agency has engaged in a good deal of correspondence regarding this requirement with both citizens and Government officials to all of whom the procedure seems cumbersome and unnecessary. We have had to take the position in replying to this correspondence that section 503(e) of the act, as presently worded, leaves us no choice in the matter.

We believe the recording system could be administered more efficiently and more simply if we had that choice. We therefore recommended to the House committee that section 503(e) of the Federal Aviation Act of 1958 be amended to permit the Administrator of the Federal Aviation Agency to determine what instru-

ments or conveyances must be so acknowledged before recordation. We suggested that this could be accomplished by inserting the phrase "Except as the Administrator may by regulation prescribe," as the introductory phrase to the sentence now serving as section 503(e) of the Federal Aviation Act of 1958. Section 2 of H.R. 8673 incorporates this recommendation and we favor its enactment.

The Bureau of the Budget has advised that there is no objection from the standpoint of the administration's program to the submission of this report to your committee.

Sincerely,

N. E. Halaby, Administrator.

GENERAL COUNSEL OF THE DEPARTMENT OF COMMERCE,
Washington, D. C., March 25, 1964.

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U. S. Senate,
Washington, D. C.

Dear Mr. Chairman: This is in further reply to your request for the views of this Department concerning H.R. 8673, an act to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes.

The principal purpose of H.R. 8673 is to amend title V of the Federal Aviation Act of 1958 by adding a new section providing that the validity of any credit instrument affecting title to or interest in civil aircraft and related equipment, the recording of which is provided for under section 503 of the act, shall be governed by the laws of the place in which such instrument is delivered.

At present there is no certainty with respect to the validity of credit instruments affecting civil aircraft and related equipment. Each State has its own requirements concerning the recordation of credit instruments and the validity of contracts executed in other jurisdictions.

H.R. 8673 would tend to encourage lending institutions to extend credit to the aviation industry by establishing certainty as to the validity of credit instruments secured by aircraft, and by reducing

the costs incident to multiple filing and enforcing liens under the present system.

This Department, therefore, recommends enactment of H.R. 8673.

We have been advised by the Bureau of the Budget that there would be no objection to the submission of our report from the standpoint of the administration's program.

Sincerely,

Robert E. Giles.

THE GENERAL COUNSEL OF THE TREASURY,
Washington, February 28, 1964.

Hon. Warren G. Magnuson,
Chairman, Committee on Commerce,
U. S. Senate, Washington, D. C.

Dear Mr. Chairman: Reference is made to your request for the views of this Departmen on H.R. 8673, to amend title V of the Federal Aviation Act of 1958 to provide that the validity of an instrument the recording of which is provided for by such act shall be governed by the laws of the place in which such instrument is delivered, and for other purposes, and an amendment adopted by your committee to the bill.

H.R. 8673 would add new section 506 to the Federal Aviation Act to provide that the validity of any instrument the recording of which is provided for by section 503 of such act shall be governed by the laws of the State, District of Columbia, territory, or possession of the United States wherein it is delivered. The bill would also amend section 503 of the act to authorize the Administrator of the Federal Aviation Agency to except certain instruments from the necessity of having to be notarized before recordation.

The amendment adopted by your committee would provide as follows:

"Sec. —. Section 503(a) of the Federal Aviation Act of 1958 is amended by adding thereto the following new subsection:

" '—. Any tax lien arising under the internal revenue laws of the United States, the District of Columbia, any State of the United States or any political subdivision thereof, and the possessions of the United States, are specifically excluded from the recording provision of this section.' "

Under the present act the term "conveyance" is defined in section 101 (17) as including any "instrument affecting title to, or interest in, property." The regulations of the Federal Aviation Agency (14 CFR 503.2(a)) provide that the term "conveyance" includes a "notice of tax lien." The regulations of the Agency further provide that to be eligible for recordation a conveyance must describe the aircraft, propellers, or spare parts affected by the conveyance or lien.

The regulations of the Federal Aviation Agency are considered to be inconsistent with the provisions of sections 6321 and 6323 of the Internal Revenue Code and the regulations prescribed thereunder (26 CFR 301.6321—1, 301.6323—1). The Federal tax lien is a general lien attaching to all property and rights to property belonging to the taxpayer and the notice of the lien is not required to describe the property to which it attaches, nor is it required that the notice be filed in specific offices to cover individual pieces of a taxpayer's property. Notices of tax liens are filed in the offices designated by the States in which property subject to the lien is located, or, if the State has not by law designated an office for the filing of notices of tax liens, they are filed in the office of the clerk of the U. S. district court for the judicial district in which the property subject to the lien is situated. Notices of tax liens to cover all personal property are filed in a designated office where the taxpayer is domiciled.

The filing of the notice of Federal tax lien as prescribed by section 6323 of the Internal Revenue Code is a time-honored procedure which has been upheld by the courts over the years cf., United States v. Union Central Life Insurance Company (1961) 368 U.S. 291. Any law which could be interpreted to require that the notice of tax lien enumerate the specific property to which it attaches would create confusion where none should exist. Thus, the enactment of H.R. 8673 without your committee's amendment specifically excluding all Federal, State, and local tax liens from the recordation provisions of the Federal Aviation Act would lead to further confusion and ambiguity.

The Department submitted a report along the same lines as set forth herein on S. 475 (88th Cong., 1st sess.), a bill which would have accomplished the same purposes as H.R. 8673 and which was similar to S. 2773 (87th Con., 2d sess.). Your committee in its Report No. 1995 to accompany S. 2773 made the following comments:

"The problems in recording notices of tax liens prove particularly troublesome, since the Internal Revenue Code (26 U.S.C. 6321, 6323) provides that notices of Federal tax liens shall be filed with the U. S.

district court, or the office provided by State law in the jurisdiction where the taxpayer's property is located. The Internal Revenue Service has, as a matter of practice, only filed its notices of tax liens locally and not with the Federal Aviation Agency. Accordingly, a purchaser in examining the central filing system maintained by the Agency could easily be misled in assuming that the absence of tax lien notices in the Agency's file meant that no such lien existed. To remedy this situation, two alternative solutions are presented: An amendment to the Federal Aviation Act to exclude tax liens from the recording provisions or an amendment to the Internal Revenue Code requiring that Federal tax liens must be filed with the Federal Aviation Agency. Your committee is convinced that an amendment to the Federal Aviation Act is clearly the most practical and logical choice. A Federal tax lien is a general charge on all real and personal property of a delinquent taxpayer and does not describe specific property. Consequently the Internal Revenue Service would have no practical means of ascertaining which of the many delinquent taxpayers owned aircraft. It would have to either file every tax lien with the Agency or be required to make a most needless and time-consuming search of the Agency's aircraft registration records. In addition, since a lien is a charge on after-acquired property, effective operation of the recording system would require that all new applicants for aircraft registration certificates be checked against the current delinquent list in order that existing liens could be recorded against the newly acquired aircraft. There is also the possibility that in creating an exception for aircraft to the general scheme of tax enforcement, questions would be raised regarding the sufficiency of local notices of tax liens against other forms of property."

The Department concurs with the views expressed in the foregoing report and if H.R. 8673 is amended as recommended by your committee the Department would have no objection to its enactment. Otherwise, the Department would be strongly opposed to the proposed legislation.

The Department has been previously advised by the Bureau of the Budget that there was no objection from the standpoint of the administration's program to the submission of a similar report on S. 475, a similar bill.

Sincerely yours,

G. D'Andelot Belin,
General Counsel.

Supreme Court, U. S.
FILED
DEC 2 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-720

BANK OF HENDERSONVILLE,
Petitioner,

VS.

RED BARON FLYING CLUB, INC.,
Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-720

BANK OF HENDERSONVILLE,
Petitioner,

vs.

RED BARON FLYING CLUB, INC.,
Respondent.

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Now Comes the Aircraft Finance Association and moves that this Court permit it to file a brief amicus curiae in support of the Petition for Writ of Certiorari to the Supreme Court of Tennessee, and in support thereof says as follows:

1. The Aircraft Finance Association is an organization of aircraft lenders, manufacturers, and interested persons who are concerned and active in their commitment to working within the system for the maintenance and improvement of their society; specifically in support of promoting the availability of aircraft financing while protecting the lender. Its request for permission to appear as amicus curiae on behalf of the petitioner is another effort to assure that momentum towards these avowed goals is continued.

2. The interest of the Aircraft Finance Association in this case arises from the fact that its members are faced daily with situations in the financing of aircraft in which the same issue arises, namely, is the lender's priority position protected by recordation of his security interest with the Federal Aviation Administration despite state laws to the contrary.

In the instant case the Petitioner argues in his Petition for Writ of Certiorari from the confines of the particular facts in his case and the Tennessee law. A more complete argument on the far-reaching ramifications of the principles espoused by the Tennessee Court of Appeals and the magnitude of the increasing conflict among the decisions of various State and Federal Courts can be provided by the Aircraft Finance Association.

3. The Aircraft Finance Association has received the consent of the Bank of Hendersonville, the petitioner herein, but has not received the consent of the respondent herein, to permit the filing of its amicus curiae brief.

WHEREFORE, movant respectfully requests that it be permitted to file its amicus curiae brief in this action.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-720

BANK OF HENDERSONVILLE,
Petitioner,
vs.
RED BARON FLYING CLUB, INC.,
Respondent.

AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

The Aircraft Finance Association, together with the petitioner, Bank of Hendersonville, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee entered in this proceeding on July 31, 1978, which judgment denied the Petition of the Bank of Hendersonville for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals of Tennessee, Middle Section, entered on December 2, 1977.

OPINION BELOW

The opinion of the Court of Appeals of Tennessee, Middle Section at Nashville, and the Memorandum Opinion of the Chancellor of the Chancery Court of Putnam County, Tennessee, are set forth in the Petitioner's Appendix to his Petition for Writ of Certiorari to the Supreme Court of Tennessee and therefore are not repeated herein.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). The judgment of the Supreme Court of Tennessee was entered on July 31, 1978, and a Petition for Certiorari was filed within ninety days of that date.

QUESTION PRESENTED

Does the recordation system established under the Federal Aviation Act of 1958, 49 U.S.C. 1401 et seq., preempt state law as to the priority between a security holder who has properly recorded his interest under 49 USC 1401, et seq., and a subsequent buyer in the ordinary course of business from a dealer?

STATUTES INVOLVED

The Federal Aviation Action of 1958, 49 U.S.C. 1401-1406, as reproduced in the Appendix to Petitioner's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

All of the facts stated by the Petitioner will not be restated by Counsel Amicus Curiae. The operative facts as viewed from the perspective of this Brief are as follows:

The Bank of Hendersonville financed the inventory of a dealer in aircraft, Mid-South Aviation, Inc. The loan was secured by the dealer's aircraft inventory. The note and security agreement evidencing such secured interest were duly filed with the Federal Aviation Administration at the central registry on June 25, 1974. Such recordation was pursuant to Federal Aviation Act of 1958, 49 USC 1401-1406.

Thereafter, the Red Baron Flying Club, Inc., on August 2, 1974 purchased an aircraft from Mid-South Aviation Inc., and filed a Bill of Sale with the Federal Aviation Administration. Red Baron Flying Club Inc. did not inquire of the Federal Aviation Administration as to any secured interest in the aircraft.

Mid-South Aviation Inc. was subsequently adjudicated a bankrupt. The Bank of Hendersonville made demand on the Red Baron Flying Club Inc. for the aircraft. The Red Baron Flying Club Inc. refused and demanded that the Bank of Hendersonville release its security interest in the aircraft.

The Chancery Court of Putnam County, Tennessee, held that the Federal Aviation Act of 1958, in setting up a central recordation system, pre-empted state law regarding purchasers in the ordinary course of business from a dealer. The decision was reversed by the Court of Appeals of Tennessee, Middle Section. The Court determined that under Tennessee law, a purchaser in the ordinary course of business was superior to the recorded security interest of the Bank of Hendersonville and that the recordation system under the Federal Aviation Act did not pre-empt state laws governing such interests.

On July 31, 1978, the Supreme Court of Tennessee denied the Petition of the Bank of Hendersonville for a Writ of Certiorari.

The security interest of the Bank of Hendersonville remains of record at the Federal Aviation Administration and remains as a cloud on the title to the aircraft.

ARGUMENT

It is respectfully submitted that the court should grant certiorari in this case which involves an important federal question, as the decision of the Court of Appeals of Tennessee is in direct conflict with those of other courts.

A substantial question is presented in that yearly, thousands of aircraft are purchased from dealers and financed by lenders nationwide. The conflicting decisions arising from various state courts and United States District Courts have thrown the aviation finance industry into a state of chaos and uncertainty. Every lender who finances the inventory of a dealer and every purchaser of an aircraft is affected by the question presented. This federal question is one of substance and has not previously been decided by this court. Without clarification by this court, litigation over the intent and meaning of 49 USC 1401, et seq., particularly Section 1403 will continue. The final result will be numerous and conflicting interpretations of the effect of recordation under the Federal Aviation Act.

In rendering its decision, the Court of Appeals of Tennessee considered the effect of Title 49, Section 1403 as it pertains to title in aircraft. The Tennessee court determined that a properly recorded interest under such section, even though previous in time to a subsequent sale, does not obtain priority by virtue of such recordation under the Commercial Code of Tennessee. Tennessee law grants priority to a purchaser from a dealer despite his failure to make any effort to ascertain the existence of any prior security interests in the aircraft by checking with the central records at the Federal Aviation Administration.

The Tennessee Court of Appeals is not the only court to consider the effects of recordation on competing interests in an aircraft. Various state courts and United States District Courts have considered the issue and come to different results.

The California Supreme Court in *Dowell v. Beech Acceptance Corp.*, (1971), 476 P.2d 401, reached the opposite conclusion of the Tennessee Court in a similar fact situation. In *Dowell,* supra, an aircraft was purchased from a Beechcraft distributor who had financed the aircraft through a lender by means of a conditional sales contract. The lender, prior to the sale of the aircraft, had duly filed the contract setting forth his interest with the Federal Aviation Administration under 49 USC 1403. The purchaser failed to check the record before his purchase. Pursuant to the terms of the security instrument, the lender took possession of the aircraft upon its unauthorized sale to the purchaser. The trial court's decision in favor of the purchaser was overturned by the California Supreme Court. In so doing, the Court found that 49 USC 1403 superceded state law protecting a buyer from a dealer. The buyer took subject to the previously recorded security interest of the lender. 49 USC 1403 provides for the central recordation of "any conveyance which affects the title to, or any interest in, any civil aircraft of the United States." The California Supreme Court, concluded that "the federal statute requiring recordation and providing for the effect to be given to instruments not recorded pursuant thereto, preempts any state laws which might otherwise apply..." "We would undermine any federal policy requiring recordation to protect previously acquired aircraft titles if we

held that state law governed the rights of the parties irrespective of recordation." (*Dowell,* supra.)

The Florida District Court of Appeal in June, 1978, faced the pre-emption question in *O'Neill v. Barnett Bank of Jacksonville,* 360 S.2d 150 (Fla. 1st DCA 1978). O'Neill purchased an aircraft from a fixed based operator who had previously financed the aircraft through a lender. The lender had filed his security instruments with the Federal Aviation Administration. The purchaser failed to make the simplest of inquiries to the Federal Aviation Administration regarding prior secured interests in the aircraft before his purchase. Thereafter, the fixed based operator defaulted on the loan and the lender sought possession of the aircraft. The Florida District Court decided the question in keeping with the California Supreme Court and stated:

> "Registration of interests in aircraft is governed by federal law. Federal Aviation Act, 49 U.S.C. 1401, et seq. Section 1403(a)(1) requires the Secretary of Transportation to establish a system for recording any interest in aircraft, including security interests. If the interest is properly registered, the interest shall be valid to all persons without further or other recordation. Section 1403(d). The Substantitive validity of any instrument creating any interest subject to the registration provisions is to be determined by the laws of the state in which the instrument is delivered. Section 1406. The priority of enforceability of interests in aircraft is determined by the federal statute."
>
> *O'Neill,* supra.

The uncertainty and confusion over the effect of recordation under the Federal Aviation Act continues to grow. The

United States District Court of Appeals, Third Circuit, in *Sanders v. M.D. Aircraft Sales Inc. and General Electric Credit Corporation,* 575 F.2d 1086, 3rd Circuit (1978), reached the opposite result of the California and Florida courts. A properly recorded security interest under the Federal Aviation Act was not given priority over interests created by state law. The buyer took free of the interests recorded with the Federal Aviation Administration.

This state by state, court by court, interpretation of the effects of 49 USC 1403 is causing confusion within the entire aviation industry, lenders and purchasers alike. In dealing with a mobile chattel such as aircraft, a difference of interpretation of the status of title in such aircraft based on state laws is an intolerable situation. The varying principles of the California Courts, the Florida Courts, the United States District Courts and the Tennessee Court will remain in direct conflict without the direction of this court.[1]

This growing difference of opinion of the effect of recordation in the face of state laws which displace such previous interests, affects not only the purchase and

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[1]See *First National Commerce and Finance Co. v. The Indiana National Bank,* Florida 3d District Court of Appeal, July 5, 1978; *In re Veterans Express Co.,* 76 F.Supp. 684; *Marsden v. Southern Flight Service, Inc.,* 227 F.Supp. 411 (MDNC 1961); *Dawson v. General Discount Corporation,* 82 Ga.App. 29, 60 S.E.2d 653 (1950), in support of the position set forth in California and Florida. In direct conflict are *Cessna Finance Corporation v. Skyways Enterprises Inc., and First Security National Bank and Trust Co.,* Kentucky Court of Appeals, April 21, 1978; and the decisions of the United States District Court in *Texas National Bank of Houston v. Aufderheide,* 235 F.Supp. 599 (E.D. Ark. 1965); *Sanders v. M. D. Aircraft Sales Inc., and General Electric Credit Corporation,* U.S. Crt. of Appeals, 3d Circuit, May 3, 1978; *Haynes v. General Elec. Credit Corp.,* (1977) 432 F.Supp. 763.

sale of aircraft within the United States, but undermines the quest for certainty of title throughout the world. The United States, as a party to several international treaties, has pledged its support to the establishment of national aviation registries so that all nations may have a ready reference in a single identifiable place, for the determination of the rights in aircraft. The Convention on International Civil Aviation, ratified by the United States on August 9, 1946, and signed by 142 other nations states:

> "Chapter III. Nationality of Aircraft . . . Article 21. Report of Registrations "Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State."

The Convention on the International Recognition of Rights in Aircraft, signed by the United States in 1948, further sets forth the intention to establish one central record for each signatory nation regarding interests in aircraft. (Set forth at length in Appendix.)

The certainty of title as sought under such treaties cannot be established as long as the conflict in the interpretation of the effect of recordation under the Federal Aviation Act continues to exist.

It is respectfully submitted that the Court of Appeals of the State of Tennessee is in error and that the position of the California Supreme Court that "section 1403 provides a comprehensive system of recordation the purpose of which is to bring order to the field of aircraft title and

to protect the holders of substantial property interests in aircraft. Neither of those purposes is served if we apply state law in a manner virtually ignoring the existence of the federal system. If prior recorded interests are not protected against subsequent buyers who fail to search title, the federal policy in favor of the recordation of aircraft titles will be frustrated . . ." (*Dowell,* supra.)

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the opinion and judgment of the Court of Appeals of the State of Tennessee.

Respectfully submitted,

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Attorney for Amicus Curiae
Aircraft Finance Association.

Dated: November 27, 1978.

(Appendix Follows)

APPENDIX

APPENDIX

Convention on the International Recognition of Rights in Aircraft (The Mortgage Convention), Geneva, Switzerland, 1948, Articles I, II and III.

"Article I

(1) The Contracting States undertake to recognize:

(a) rights of property in aircraft;

(b) rights to acquire aircraft by purchase coupled with possession of the aircraft;

(c) rights to possession of aircraft under leases of six months or more;

(d) mortgages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;

provided that such rights

(i) have been constituted in accordance with the law of the Constracting State in which the aircraft was registered as to nationality at the time of their constitution, and

(ii) are regularly recorded in a public record of the Contracting State in which the aircraft was registered as to nationality.

The regularity of successive recordings in different Contracting States shall be determined in accordance with the law of the State where the aircraft was registered as to nationality at the time of each recording.

(2) Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State; but Contracting States shall not ad-

mit or recognize any right as taking priority over the rights mentioned in paragraph (1) of this Article.

Article II

(1) All recordings relating to a given aircraft must appear in the same record.

(2) Except as otherwise provided in this Convention, the effects of the recording of any right mentioned in Article I, paragraph (1), with regard to third parties shall be determined according to the law of the Contracting State where it is recorded.

(3) A Contracting State may prohibit the recording of any right which cannot validly be constituted according to its national law.

Article III

(1) The address of the authority responsible for maintaining the record must be shown on every aircraft's certificate of registration as to nationality.

(2) Any person shall be entitled to receive from the authority duly certified copies or extracts of the particulars recorded. Such copies of extracts shall constitute prima facie evidence of the contents of the record.

(3) If the law of a Contracting State provides that the filing of a document for recording shall have the same effect as the recording, it shall have the same effect for the purposes of this Convention. In that case, adequate provision shall be made to ensure that such document is open to the public.

(4) Reasonable charges may be made for services performed by the authority maintaining the record."

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-720

BANK OF HENDERSONVILLE,
Petitioner

v.

RED BARON FLYING CLUB, INC.,
Respondent

RESPONSE TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

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RESPONSE TO MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Comes now the Red Baron Flying Club, Inc., respondent herein, and asks the Court to deny the Motion of the Aircraft Finance Association for leave to file an amicus brief in this cause and for grounds to suggest that the Court to deny such motion respectfully states and shows to the Court that:

1. The only issue before the Tennessee Supreme Court in the case at bar was whether or not a duly perfected inventory security interest in an aircraft survives a sale by the dealer to a purchaser in ordinary course of business. The applicant for intervention attempts to set up a claim of conflict between the Federal Aviation Act of 1958 and the provisions of the Uniform Commercial Code. There is no such conflict because the FAA Act of 1958 provides only for the place of filing or perfecting a security interest and is silent as to the effect of such filing which is left to the jurisdiction of the several states.

2. The general rules for all commercial transactions in the United States and the effect of various activities by parties with respect to security interests are set out in the Uniform Commercial Code and the momentum of the several states has been toward greater consistency and uniformity. The position of the motion of the proposed intervenor would be disruptive of that momentum for uniformity.

3. Contrary to the position taken in paragraph 2 of the proposed intervenor's motion, there is no issue of "priority" whatsoever. The issue is the validity of an inventory security interest as against the rights of a purchaser in ordinary course of business.

4. The respondent, The Red Baron Flying Club, Inc., a small private club which owned one plane, should not be compelled to bear the financial burden of the necessity to respond to pleadings filed by organizations which are not parties to the litigation.

WHEREFORE, the Red Baron Flying Club, Inc. respectfully moves the Court to deny the application of the Aircraft Finance Association to intervene in this cause.

Ernest Williams, III

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BRIEF OF RED BARON FLYING CLUB, INC. IN OPPOSITION TO BRIEF TENDERED IN BEHALF OF AIRCRAFT FINANCE ASSOCIATION

Red Baron Flying Club, Inc. respectfully prays that this Court decline to issue any writ of certiorari to review the judgment of the Tennessee Supreme Court entered in this cause on July 31, 1978.

QUESTION PRESENTED

Movant and the original petitioner repeatedly attempt to express the question in this case as one of "priority." Priority is not the issue. The issue is whether an inventory security interest in an aircraft is *valid* as against a purchaser in ordinary course of business from a dealer in aircraft. It is worth noting that in no other field of commerce is an inventory security interest "valid" as against a purchaser in ordinary course of business.

ISSUE SUCCINCTLY STATED

The issue succinctly stated is:

WHETHER AN AIRCRAFT DEALER'S INVENTORY FLOOR PLAN SECURITY INTEREST, DULY PERFECTED UNDER THE FAA ACT OF 1958, SURVIVES A SALE TO A PURCHASER IN ORDINARY COURSE OF BUSINESS FROM THAT DEALER.

ISSUE STATED AS A LEGAL QUESTION

Stated in terms of the legal question, the issue is:

WHETHER THE FAA ACT OF 1958 PREEMPTS STATE LAW (THE UNIFORM COMMERCIAL CODE,

TENNESSEE CODE ANNOTATED §47-9-307) WHICH GIVES A BUYER IN THE ORDINARY COURSE OF BUSINESS GOOD TITLE EVEN THOUGH THERE WAS A PERFECTED SECURITY INTEREST IN THE AIRCRAFT IN THE HANDS OF THE DEALER.

STATEMENT OF FACTS

The facts are uncontroverted. Mid-South Aviation, Inc., an aircraft dealer, sold to Red Baron Flying Club, Inc. (Respondent herein) the subject aircraft out of its (Mid-South's) stock of several aircraft. The respondent, Red Baron Flying Club, Inc., was a "purchaser for value in the ordinary course of business" or a "bona fide purchaser for value." The airplane was paid for by a cashier's check. At the time of the sale, the Bank of Hendersonville (petitioner herein) held a floor-plan or inventory security interest upon a number of Mid-South's (the dealer) aircraft including the subject plane. Mid-South failed to satisfy the inventory security interest of petitioner. Mid-South subsequently was adjudicated a bankrupt.

The Bank of Hendersonville initiated this cause of action to enforce its lien against the subject aircraft. Red Baron claims the benefits of the rights of a purchaser for value in the ordinary course of business under the Uniform Commercial Code. The term "puchaser for value in the ordinary course of business" is defined in Tennessee Code Annotated at 47-1-201(q) and the rights of a "purchaser for value in ordinary course of business' are set out in Tennessee Code Annotated 47-9-307.

The security interest of the Bank of Hendersonville was, at all pertinent times, duly recorded with the FAA Aircraft Registry in Oklahoma City in accordance with 49 U.S.C. §§1401-1406.

The United States Congress by the enactment of the Federal Aviation Act of 1958 (48 U.S.C. §§1401-1406), essentially a re-enactment of the 1938 Civil Aeronautics Act, created a central place in which a security interest in a highly mobile piece of equipment such as an airplane could be filed. This enactment in no wise changed the *effect* of the perfection. The Federal Aviation Act is absolutely silent as to many aspects of secured transactions. It contains no procedures for foreclosure. It is silent as to priority of claims and says nothing about the ultimate effect of recordation as to third parties. Under the Uniform Commercial Code, Article IX is the section relating to secured transactions, Article IX, Section 104 excludes from the effect of the Code so much of certain transactions as fall under certain federal acts. The official code comment to T.C.A. §47-9-104(a) says it clearly:

> "BUT TO THE EXTENT THAT THE FEDERAL AVIATION ACT DOES NOT REGULATE THE RIGHTS OF PARTIES TO AND THIRD PARTIES AFFECTED BY SUCH TRANSACTIONS, SECURITY INTERESTS IN AIRCRAFT REMAIN SUBJECT TO THIS ARTICLE."

As was set out in respondent's original brief, there are currently eleven reported cases that involve the precise issues as set out in the instant case. Intervenor attempts to cite one additional case. This case is *Richard O'Neill v. Barnett Bank of Jacksonville*, a case decided by the District Court of Appeals of Florida for the First District on June 30, 1978 and reported at 360 So.Rptr.2d, p.150. The case is easily distinguishable in that the aircraft involved in the O'Neill case was not a part of the inventory of a dealer. O'Neill ". . . knew it was not a part of (the dealer's) sales inventory, he did not purchase it from (the dealer's) sales inventory and . . . O'Neill knew that (the

dealer's) principal business was fixed base operation, not the sale of aircraft." (At page 152).

> To put it in the exact words of the Florida court:
> "O'Neill was not a buyer in the ordinary course of business as required by Section 671.201(9), therefore Section 679.307(1) is not applicable to this case." (At page 152.)

An argument of estoppel was offered on behalf of O'Neill. The Florida Court summed it up in these words:

> "O'Neill's estoppel argument is without merit because Section 672.403, Florida Statutes (1975), applies only to financing transactions which involve floor planning of inventory. Barnett (the bank) did not floorplan the aircraft in litigation nor was O'Neill a buyer in ordinary course." (At page 153.)

In the instant case, by written stipulation, the Red Baron Flying Club, Inc. was a purchaser in the ordinary course of business of the subject aircraft. In another paragraph of the same stipulation, the Red Baron Flying Club, Inc. is referred to as a "bona fide purchaser for value."

Another distinguishing feature between the instant case and the *O'Neill* case is in the *O'Neill* case the aircraft was held not to be a part of the dealer's sales inventory. In the instant case, by stipulation, it was agreed that the subject aircraft was a part of the dealer's inventory. The stipulation filed in this cause is the Appendix to this Brief.

Thus, the O'Neill case has no application to the instant situation.

There is no argument but that any state which so chooses can "subordinate" its own statutes and laws even to the non-existent provisions of some federal statute.

California has apparently elected such a course in *Dowell v. Beech Acceptance Corporation, Inc.*, 3 Cal.3d 544, 91 Cal.Rptr. 1, 476 P.2d 401 (Cal. 1970) *cert. den.* 404 U.S 823, 92 S.Ct. 45, 30 L.Ed2d 50 (1971) Tennessee has elected the far more sensible rule of uniformity and consistency in commercial transactions and has followed the provisions of the Uniform Commercial Code on points at which the Federal Aviation Act of 1958 is silent.

The application for intervention also cites several cases at the bottom of page 9 in Footnote 1 as supposedly illustrative of the conflict in decisions. The cases supposedly supporting the position contrary to the position taken by the Supreme Court of the State of Tennessee are not in point at all. These cases include *In Re Veterans Express Co.*, 76 F.Supp. 684, a 1948 case relating to the relative priority and seniority as between a mechanic's lien claimant and a claim of the United States arising out of a chattel mortgage taken by the United States as a part of the purchase price of aircraft sold by the United States to the War Assets Administration which said chattel mortgages were recorded in accordance with the Civil Aeronautics Act of 1938 when the repair work was done on the aircraft after the recordation of the chattel mortgages. The case had nothing whatsoever to do with a purchaser in ordinary course of business or the question of whether or not an inventory security interest survives a sale to a purchaser in ordinary course of business. The next case cited is the case of *Marsden v. Southern Flight Service, Inc.*, 227 F.Supp. 411 (M.D.N.C. 1961). In that particular case, the dealer sold the subject aircraft to a purchaser who totally failed and neglected to record the conveyance and transfer of the aircraft into said purchaser's name. The aircraft was left in the possession of the dealer, and the dealer used the aircraft as security to obtain a fradu-

lent and improper loan to the dealer by a third party. The position in this case was exactly the reverse of the instant case. The lending institution relied upon the public record which showed the aircraft still to be owned by the dealer because the purchaser had failed to record the transfer to the purchaser. The loss was caused by the purchaser's failure to record the transfer.

The next case cited by the proposed intervenor is the case of *Dawson v. General Discount Corporation*, 82 Ga.App. 29, 60 S.E.2d 653 (1950). This is a case in which evidentiary issues are the primary concern. However, it does not appear that the issue is a conflict between a purchaser in ordinary course of business and a secured party claiming a security interest in the inventory of a dealer.

The last two authorities cited by proposed intervenor are two "conventions" entered into by the United States. These authorities are the Convention on International Civil Aviation, Chicago 1944, and the Convention on International Recognition of Rights in Aircraft. The 1944 convention can be found in a volume cited as Treatises and Other International Agreement of the United States of America, 1776-1949, Vol. 3, beginning at page 944. The preamble to this convention reads as follows:

"

PREAMBLE

WHEREAS, the future development of international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS, it is desirable to avoid friction and promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that *international civil aviation* may be developed in a safe and orderly manner and that *international air transport services* may be established on the basis of equality of opportunity and operated soundly and economically;

Have according concluded this Convention to that end." (Emphasis added)

A full reading of that Convention makes it obvious that, although it makes reference in passing to other civil aircraft, the treaty is directed toward the regulation of the international operation of air carriers and airlines. In no way does it address security interests in aircraft.

The second authority cited by amicus counsel, the Convention of 1948 is referred to by amicus counsel as "the Mortgage Convention." In no place does such a title appear. The treatise can be found in the volume entitled "United States Treaties and Other International Agreements, Volume 4, Part II, 1963."

The attention of the Court is particularly directed to Article II(2) of this convention. It reads as follows:

"(2) Except as otherwise provided in this Convention, the effects of the recording of any right mentioned in Article I, Paragraph (1) with regard to third parties shall be determined according to the law of the Contracting State where it is recorded."

In sum, this particular convention in fact recognizes the local laws of the signatories to the convention as controlling the rights of third parties.

The most exhaustive treatise on interests in aircraft is the treatise called *Sigman, "The Wild Blue Yonder: Interests in Aircraft Under Our Federal System,"* 46 So. Cal.L. Rev. 316 (1973). This treatise not only summarizes the cases exactly in point with the instant case but all of the analogous situations. Many of the leading cases were decided subsequent to the publication of the *Sigman* treatise. It might, perhaps, aid the Court to see the reasoning of various courts in a small number of cases identical to the instant case. Each of the identical cases were decided subsequent to the aforesaid *Sigman* treatise.

In *Idabell National Bank v. Tucker*, Okla.App. 1975, Cert. denied by Okla. Sup. Ct., the title and right of a purchaser in ordinary course of business was held to be superior to that of a bank holding a prior recorded mortgage from the dealer. After quoting applicable and persuasive portions of the legislative history of the U.S.C.A. §1403, the Oklahoma Court adopts the language of *Texas National Bank of Houston v. Aufderheide*, 235 FSupp. 599 (E.D. Ark. 1964), as follows:

> "Ordinarily, when a person goes into a merchant's place of business to make a purchase, whether it be of an automobile, a television set, a washing machine, or a pound of nails, the purchaser ought to have the right to assume that the merchant has a right to sell the commodity in question and should not be required to make a [record] search before purchasing or to see to it that the merchant obtains a valid release of the item from a bank floor plan before delivering it to the purchaser and receiving his money or obligation. The Court sees no reason why that right should not extend to the purchaser of an airplane who buys it from a recognized dealer from a regular inventory or display and in the ordinary course of business."
>
> 544 P.2d, p. 1291

The case of *Haynes v. General Electric Credit Corporation*, U.S.D.C. W.D. Va., March 8, 1977, 432 F.Supp. 763, 22 U.C.C. Reporting Service 514, is one of the most recent cases specifically on point. It makes a thorough study of the relationship between the Uniform Commercial Code and the Federal Aviation Act of 1958, as well as of all the prior cases including the *Dowell* case. Some of the points touched upon in the *Haynes* case are precisely in point with the instant case. The opinion begins with these words:

> "This action presents the important question of whether the system of recordation of title to aircraft under §503 of the Federal Aviation Act of 1958, 49 U.S.C. §1403, displaces and preempts state law that would otherwise govern on priorities of lien and title interests in aricraft. More specifically, *the Court must determine whether congress intended by enactment of the aforementioned statute to affect priorities existing under state law between a prior security holder and a subsequent buyer in the ordinary course of business.*" (at page 763—emphasis ours)

There was no dispute of the facts. Haynes bought the airplane as purchaser in the ordinary course of business from MD, a retail dealer in aircraft. GECC was financing the airplane as part of the inventory for MD. Haynes seeks a determination that he was purchaser in ordinary course of business and, therefore, took free and clear of the inventory security interest. The Court went on to say:

> "Prior to purchasing the aircraft, Mr. Haynes did not search the records of the Federal Aviation Administration to determine the existence of any outstanding liens or security interests in the aircraft, nor did he have actual knowledge of the security interest." (At page 764)

The Court then discussed the applicable statutes and had this to say:

"While congress has the power to legislate in the field of aircraft conveyancing and to preempt state laws that would otherwise apply, the question in this action is the extent to which the Federal Aviation Act covers an area of legislation also covered by state law. After carefully reviewing the matter, the Court finds that congress did not intend by adoption of the cited recordation procedure to displace state laws that would otherwise govern priorities of lien and title interests in aircraft. The very language of the statute seriously undermines any attempt to characterize the act as completely preempting state laws on secured transactions. The statute says that no interest shall be *valid* in the absence of federal recordation, but the act is silent on the issue of priorities between various lienholders." (At page 765, emphasis in the original)

In the *Haynes* case, GECC raised exactly the same issue now being offered by the petitioner, Bank of Hendersonville. The argument was to the effect that Article 9, §104 specifies ". . . that the U.C.C. does not apply 'to a security interest subject to any statute of the United States.'" The Court's response was the following:

"It must be noted, however, that the exclusionary language in the code applies only to the extent that 'the federal statute governs the rights of the parties to and third parties affected by transactions in particular types of property.' 'It specifically leaves open the possibility that Article 9 could be looked to for an answer in the event that the federal statue contains no relevant provision.'" (At page 766)

The Court then went into a study of the legislative history of the FAA act. The Court then made this comment:

"Because the Federal Aviation Act does not alter existing laws in this regard (priorities), it is apparent that the comprehensive federal statute envisioned by code commentators as totally preempting the field of conveyancing of interest in aircraft was never enacted into law." (At page 767)

The Court then discussed all of the prior cases concerning disputes between inventory secured parties and purchases in ordinary course of business. Citing *State Securities Co. v. Aviation Enterprises, Inc.*, 355 F.2d. 225, CA-10 (1966), this Court said:

". . . 'Courts have evolved the estoppel theory based on the maxim that, as between two innocent victims of fraud, the one who makes possible the fraud on the other should suffer.'"

State Securities at 229, Haynes at 767

The Court in *Haynes* then cited with approval the following language from *Aircraft Investment Corporation v. Pezzani & Reid Equipment Co.*, 205 F.Sup. 80 (E.D. Mich. 1962), which stated that:

"Plaintiff suggests that congress has preempted the entire field of conveyancing of interest in aircraft. This view is erroneous, notwithstanding *In Re: Veterans' Air Express Company*, 76 F.Supp. 684 (D. N.J. 1948), which contains dicta on which plaintiff relies. Congress has said only that until an instrument purporting to convey an interest in an aircraft is recorded in accordance with the Act, it is void as to third parties without notice. Upon Federal recordation, it is valid without further recording. In providing for the recordation of various instruments pertaining to transactions affecting title or interest in aircraft, congress has not impaired the existence and effectiveness of state laws creating and defining such instruments. Excepting the recording section of the Federal Aviation Act, the validity of the chattel mortgage here in question must be measured by the appropriate state law. [261 A.2d, at pg. 405, 205 F.Sup. at pg. 82]"

Haynes at 768.

Petitioner relies upon only one authority, *Dowell*. California appears to stand alone in its insistence that a customer who buys an airplane out of the stock of a dealer

must carry out a "title search" for recorded "floor plan" liens.

In conjunction with establishing a nation-wide filing system, the Federal Aviation Act has provided that a federally recorded aircraft interest shall be "valid as to all persons without further or other recordation, . . ." 49 U.S.C. §1403(d) (quoted above). In using the term "valid" within the context of establishing a nation-wide filing system, the Federal Act would appear to be using the term "valid" as a synonym for *perfection*. In similar fashion, the UCC has established a state-wide filing system for perfecting security interests in various forms of collateral. There is no dispute that the federal nation-wide aircraft security interest filing system preempts the state-wide UCC filing system as to perfection of a security interest in an airplane.

However, the Bank of Hendersonville argued in the lower court that in its use of the term "valid," the Federal Aviation Act intended to set forth a rule of both *perfection* and *priority*.

Apparently, the Bank's position is based upon its belief that the term "valid" is synonymous with the phrase "perfected and superior and prior to." However, merely to say that a recorded lien is "valid" is not to say that such lien is superior and prior to all other interests in the same security. Indeed, as a noted commentator has stated, "Recordation itself merely validates; it does not grant priority." Scott, "*Liens In Aircraft: Priorities.*" 25 J.Air L. & COM., 193, 203 (1958). The Petitioner's position ignores the distinction between "perfection" and "priority."

After arguing the invalid *premise* that the above-quoted provision of the Federal Aviation Act establishes a rule of

priority as well as a rule of perfection, the Bank of Hendersonville argues that this "Federal Rule of Priority" preempts the Tennesssee rules governing the priority of various security and ownership interests in collateral. This very same argument was specifically rejected in three recent decisions. *Industrial National Bank v. Butler Aviation International, Inc.*, 370 F. Supp. 1012 (Ed. N.Y. 1974); *Carolina Aircraft Corp. v. Commerce Trust Co.*, 298 So.2d 37 (Fla. App. 1974); *Southern Jersey Airways, Inc., v. National Bank of Secaucus*, 261, A.2d 299 (1970).

Petitioner has argued that, because airplanes are expensive some different rule should apply. Large earth-moving machinery is frequently more expensive than most airplanes. From the inventory of an equipment dealer, a clear title to such equipment can be conveyed by a dealer to a purchaser for value in ordinary course of business whether or not the claim of the inventory secured party is satisfied.

CONCLUSION

The Tennessee Court of Appeals summarized its position as follows:

> This Court prefers to follow the rule announced in all of the decisions (other than Dowell) that the rights of a purchaser from a dealer in ordinary course of business are superior to the holder of the lien upon a moving stock of planes in the hands of a dealer. There are a number of reasons why this decision is preferable.
>
> (1) The Uniform Commercial Code has brought uniformity and order to the field of commercial law. To graft a new class of exceptions upon the existing uniform law would reverse the wholesome intent and result of the law.
>
> (2) It is not reasonable to assume that Congress intended any such result where not clearly stated.
>
> (3) The proliferation of aircraft dealerships and aircraft purchases would be seriously impaired if the public were not allowd to trust dealers selling in ordinary course of business.
>
> (4) It is inequitable and unjust to allow a mortgagee to hold "secret liens" on chattels while authorizing the chattels to be exhibited for sale by a dealer to the deception and loss of the purchasing public.
>
> (5) Lien holders may protect themselves (if they deside by impounding the mortgaged planes in locked surroundings inconsistent with the free-sales situation of the stock of merchandise.

The Tennessee Supreme Court denied certiorari per curium.

To all of this, respondent can only add that, where the Federal law speaks, it preempts State law. Where the

Federal law is silent, the State law prevails. Traditionally, the courts of all states have guarded the rights of purchasers for value in ordinary course of business for many years and there is nothing in the Federal Aviation Act which justifies any change from that position.

Respondent respectfully asserts that the judgment of the Court of Appeals for the State of Tennessee and the judgment of the Supreme Court of the State of Tennessee was completely correct, the petition for certiorari should be denied, and the petition to intervene should be denied.

Respectfully submitted,

Ernest Williams, III
Attorney for Respondent
Red Baron Flying Club, Inc.

OF COUNSEL:

HEISKELL, DONELSON, ADAMS,
WILLIAMS & KIRSCH

2020 First Tennessee Bank Building
Memphis, Tennessee 38103

By: _____

IN THE CHANCERY COURT
FOR PUTNAM COUNTY, TENNESSEE
AT COOKEVILLE, TENNESSEE

BANK OF HENDERSONVILLE,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	NO. 1002
	)	
MID-SOUTH AVIATION, INC.,	)	
RED BARON FLYING CLUB, INC.,	)	
and CITIZENS BANK OF	)	
COOKEVILLE, TENNESSEE,	)	
	)	
Defendants.	)	

STIPULATION OF FACTS

This is a suit to determine the relative rights of a purchaser in ordinary course of business of an airplane and a bank which took a security interest in the airplane while it was still part of the inventory held for resale by an aircraft dealer who subsequently sold the airplane to the purchaser in ordinary course.

The Red Baron Flying Club, Inc., is a Tennessee corporation and is a club organized to let its members have access to airplanes which the club members fly.

Mid-South Aviation, Inc. was an aircraft dealer, incorporated under the laws of the State of Tennessee and having aircraft sales establishments at Nashville Metro Airport, Memphis International Airport and the Municipal Airport of Lafayette, Tennessee. Since the occurence of the events which are the subject matter of this litigation, Mid-South Aviation, Inc. has been declared bankrupt by the United States District Court for the Middle District of Tennessee.

On August 2, 1974, in the ordinary course of business, members of the Red Baron Flying Club selected from among the inventory of airplanes held for sale by Mid-South Aviation, Inc., a new Piper Cherokee Airplane. The club paid the full purchase price for the airplane and Mid-South Aviation, Inc., gave the club an

invoice and bill of sale to the airplane warranting title thereto. A copy of the invoice and the bill of sale are attached to this Stipulation as Exhibits Nos. 1 and 2.

Immediately after the purchase of the aircraft, the Red Baron Flying Club (on August 5, 1974) forwarded its bill of sale to the FAA in Oklahoma City to show evidence of the club's ownership of the aircraft.

Subsequently, it was discovered that the dealer, Mid-South Aviation, Inc. had double financed the airplane while said airplane was a part of its inventory. In the course of the purchase of the airplane by the Red Baron Flying Club as bona fide purchaser for value, one of the institutions which held an inventory security interest in the subject aircraft was apparently paid off. The other, the Bank of Hendersonville, plaintiff herein was not and subsequently instituted this suit.

When the Red Baron Flying Club, Inc. purchased the subject aircraft from the dealer, Mid-South Aviation, Inc., it financed the purchase through the Citizens Banks of Cookeville, Tennessee. However, since the date of the institution of this suit, the security interest of the said Citizens Bank of Cookeville, Tennessee, has been paid and satisfied in full. Therefore, the only remaining parties to this cause of action are the plaintiff, The Bank of Hendersonville and the Red Baron Flying Club, Inc.

The security interest of the Bank of Hendersonville is represented by a note and security agreement which bears the date of June 11, 1974, and the instrument was filed for record with the FAA Aircraft Registry in Oklahoma City, Oklahoma on June 25, 1974.

Defendant, The Red Baron Flying Club, Inc., has further learned from the attorney for the Bank that, subsequent to the date on which the subject aircraft was conveyed to the Red Baron Flying Club as bona fide purchaser for value, Mid-South Aviation, Inc. apparently made a number of payments to the said Bank as follows:

September 7, 1974	$1,307.50
October 3, 1974	$ 653.75
January 30, 1975 (credit)	$ 33.00
Total Payments Made	$1,994.25

For the convenience of the Court in examining this matter the following documents are attached hereto as Exhibits Nos. 3, 4, 5, 6 and 7:

Exhibit No. 3, an aircraft title report resulting from a FAA records search made for defendant, Red Baron Flying Club, Inc. by insured, Aircraft Title Service, Inc., on February 18, 1975.

Exhibit No. 4, a copy of the loan and security agreement executed by Mid-South Aviation, Inc. to the Bank of Hendersonville, Hendersonville, Tennessee on June 15, 1974 together with a copy of the note for which said loan and security agreement was given as security. The next page is the reverse side of the security agreement showing the recording thereof with the FAA Aircraft Registry Office in Oklahoma City, Oklahoma.

Exhibit No. 5, the security agreement apparently given by Mid-South Aviation, Inc. as a part of the scheme of the double financing of this aircraft as a part of the inventory of the said Mid-South Aviation, Inc. which said security agreement was given to Nashville Bank & Trust Company. The next page shows the reverse side of this instrument together with recorded information showing the filing of said instrument with the FAA Aircraft Registry in Oklahoma City, Oklahoma. This security agreement was apparently the one which was paid off by Mid-South Aviation, Inc. upon the occasion of the purchase of the subject aircraft by the Red Baron Flying Club, Inc.

Exhibit No. 6, this is a copy of the front and back of the security agreement executed with Red Baron Flying Club, Inc. by which security agreement they obtained the funds with which to purchase from Mid-South Aviation, Inc. the subject aircraft. The second page of this Exhibit shows the notation of the filing of the instrument with the FAA Aircraft Registry in Oklahoma City, Oklahoma. This particular security agreement was subsequently paid off and satisfied by the Red Baron Flying Club, Inc.

Exhibit No. 7, this Exhibit is a copy of the cashier's check which was the proceeds of the loan secured by the security agreement which is Exhibit No. 6 with the Citizen's Bank of Cookeville, Tennessee. As per the second page of the Exhibit, it shows the endorsement on the reverse side thereof of the Red Baron Flying Club, Inc., Mid-South Aviation, Inc. was apparently used to pay and satisfy the loan evidenced by Exhibit No. 5.

At the hearing of the cause, Mr. Bruce Carter, the Assistant Vice President of the Bank of Hendersonville, testified concerning the obligations and debt claimed by the Bank of Hendersonville in this cause of action. He testified that he had no personal knowledge of the transaction but was only testifying from the records available to him. According to these records, as of the 10th day of May, 1976, the outstanding balance due and owing upon the obligations held by the Bank of Hendersonville was $13,759.59.

Mr. Bruce Carter further testified that according to his records the Bank of Hendersonville was financing a number of aircraft as a part of the inventory of Mid-South Aviation, Inc. He further testified that the Bank of Hendersonville had filed a claim in Mid-South Aviation, Inc. bankruptcy proceedings and that he did not know whether or not any funds would be available for distribution as a result of said bankruptcy proceeding.

It is further stipulated by and between the parties that the Exhibits attached to this Stipulation may be treated by the Court as having been offered and received in evidence as if the same had been introduced and offered in open court and the copies may be substituted for the originals.

This _____ day of November, 1976

BANK OF HENDERSONVILLE

By: _____
W. Harold Bigham, Attorney

RED BARON FLYING CLUB, INC.

By: _____
Ernest Williams, III, Attorney